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Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, a Corporation,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

Respondents.

BRIEF FOR RESPONDENT NATIONAL SURETY CORPORATION.

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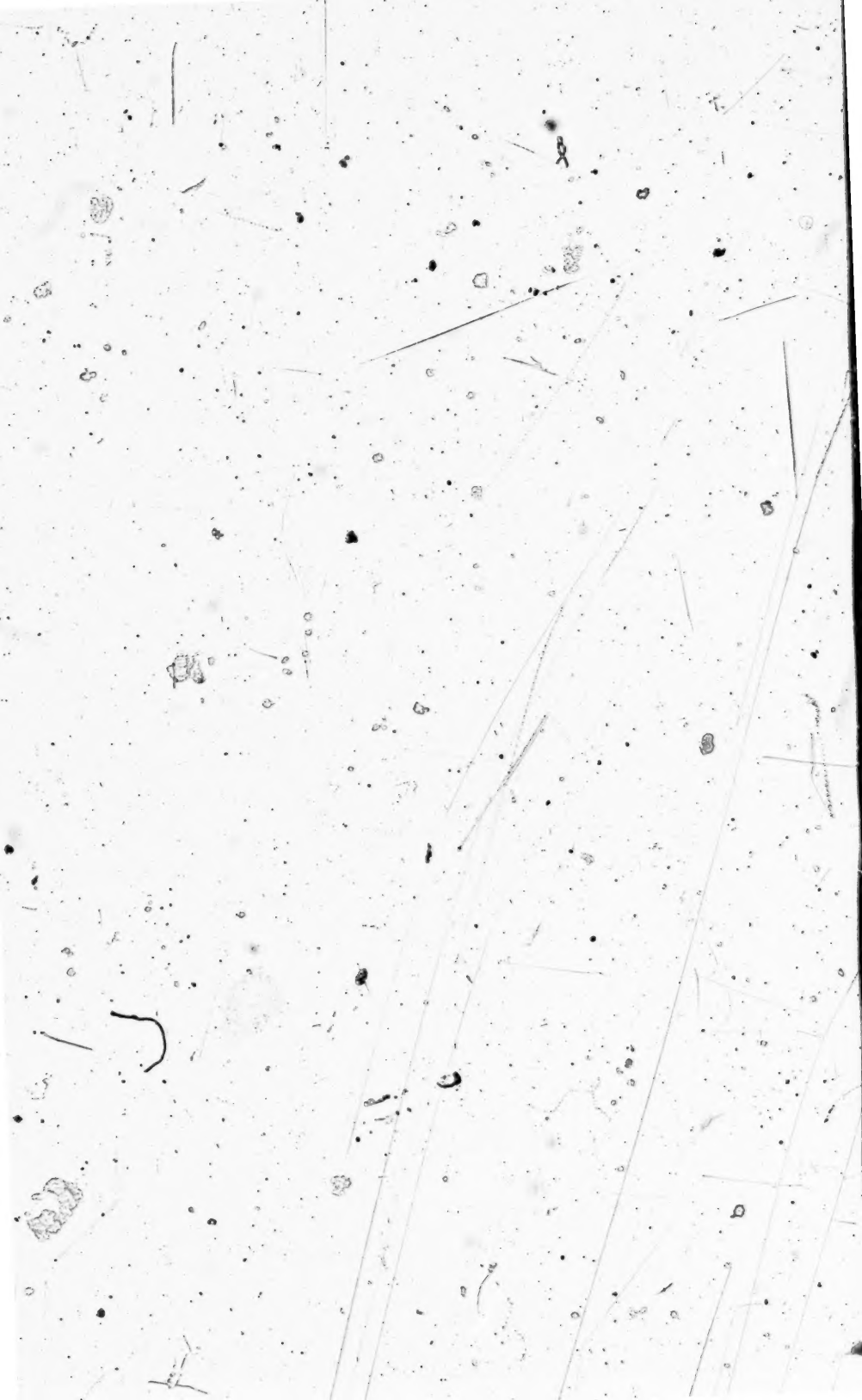

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vs.

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Respondents.

BRIEF FOR RESPONDENT NATIONAL SURETY CORPORATION.

OPINIONS BELOW.

Certiorari to the Circuit Court of Appeals of the Eighth Circuit to review an affirmance of a judgment of the District Court for the District of Minnesota dismissing plaintiff's* action. The reference on page 1 of plaintiff's brief

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NOTE: *For convenience in reference, in this brief the parties will be referred to as they were in the trial court. Unless otherwise indicated, the figures in parentheses refer to the pages of the printed record and the Italics in quotations, statutes or regulations are ours.

to the printed reports and the record setting forth the opinions delivered in the courts below is accurate.

GROUNDS OF JURISDICTION.

Jurisdiction of this Court to review the Circuit Court of Appeals is invoked under the powers conferred by Section 240 (a) and Section 262 of the Judicial Code (28 U. S. C. A., par. 347, par. 377). That power is conceded. However, a careful examination of the decisions of the courts below in this case will establish that the case is not one for the exercise of the powers conferred by the sections cited. Cf. *Magnum Company v. Coty*, 262 U. S. 159, 163; *In re Church Street Corporation*, 299 U. S. 24, 26. This writ was improvidently issued. There is no conflict between circuits. There is no question of local law. The absence of litigation on the point in the one hundred fifty years existence of the postal establishment negatives the conclusion that the question of federal law is important. No conflict with any decision of this Court, not palpably distinguished in the opinions below, is suggested. No departure from the accepted and usual course of judicial proceeding has been suggested.

STATEMENT OF THE CASE.

The following from the opinion of the Circuit Court of Appeals states the case tersely:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the Government, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the sender?" (102)

STATEMENT OF FACTS.

The material facts are set forth by the trial court in its opinion (70-72). They may be summarized as follows:

The plaintiff, Midland Loan Finance Company, brought this action in the name of the United States but for its own use and benefit (fol. 3). The consent of the United States to the bringing of the suit was sought but not obtained (58-60). The action was against a postmaster upon his bond (18). The total alleged loss was $34,997.03 (fol. 17). The penalty of the bond was $16,000 (19). The questions sought to be reviewed were presented during trial (48) and before verdict (61-63). Ruling was reserved (fol. 78) and after verdict the action was dismissed by the trial court (fol. 83).

Plaintiff was engaged in the automobile finance business in Minneapolis, purchasing contracts of sale from automobile dealers in rural towns. One Hunting was such a dealer at Montgomery, Minnesota, where the defendant Malone was acting postmaster. Hunting from time to time

sold plaintiff conditional sales contracts, with the installment note of the purchaser, and plaintiff then and there paid Hunting for them (fol. 48). In submitting contracts and notes for sale to the plaintiff Hunting gave to plaintiff credit references of the makers of the notes and contracts. Plaintiff after its purchase of the paper addressed letters to the makers of the contracts and to the credit references at Montgomery. Hunting convinced the postmaster it was proper for him to deliver many of such letters to him (Hunting). It later developed that many of the contracts so sold by Hunting to the plaintiff and concerning which the plaintiff subsequently wrote the purported makers were spurious. Since the letters addressed to credit references and to the purported makers of forged or fictitious contracts were not returned to the plaintiff, plaintiff assumed they had been delivered to the addressees. It claimed that thereby it failed to discover the fraud practiced upon it by Hunting prior to its use of the mail, and that consequently Hunting was enabled to practice further similar frauds upon it. It was not claimed that any of the money which plaintiff lost to Hunting came into the possession of the defendant acting postmaster, or that he had any knowledge of the frauds that were being perpetrated by Hunting on the plaintiff (70-72; 103).

Acting upon motions made during trial (48; 61-63) the trial court, after verdict, dismissed the action as to the surety of the postmaster (67). From that dismissal plaintiff appealed to the Circuit Court of Appeals and its affirmance (107) is now presented for review.

From the foregoing it will be seen, and should be carefully noted, that there are four things *not* involved in this review:

(1) There is no question of the right of the plaintiff to sue the postmaster for any damage it may have suffered from any wrong committed against it by the postmaster.

(2) There is no question about the right of the United States to sue upon this bond, either in its own proper behalf or to recover on behalf of private mail users whatever has been lost in the transmission of the mails.

(3) This action is not one for the intrinsic value of property lost in the mail, but is an action for damages consequential upon misdelivery—i. e., damages occasioned by the acts of persons other than the postmaster and only claimed to have been concealed by inferences from the misdelivery.

(4) There is no question in the case about the effect of verdict, because the instructions of the Court to the jury are not in the record, and because the motion [the granting of which resulted in the judgment from which appeal is taken] was made prior to verdict, and because upon dismissal and setting aside of the judgment into which verdict was merged the verdict disappeared.

Wherever in the statement of facts made by plaintiff in its brief there is a departure from this statement of facts, it will be found either that the statement of that brief is not supported by the record or that the fact is immaterial to the question under review.

THE BOND INVOLVED.

The bond involved is set forth on page 19 of the record. In addition to the condition of it quoted on page 6 of plaintiff's brief, it names as obligee "The United States of America". The trial court considered this important (74, 77, 87), as did the Circuit Court of Appeals (103, 105), as did the Congress (5 U. S. C. A., Sec. 377). The bond names its obligee in the following language:

> "* * * * we * * * Malone * * * as principal * * * and National Surety Corporation * * * * * * as surety * * * do hereby bind ourselves * * * *to pay to the United States of America* the sum of Sixteen Thousand Dollars ($16,000.00) * * *."

THE STATUTES INVOLVED.

The statute which the Circuit Court of Appeals deemed "pertinent" (104), and which is omitted from those set forth on pages 6 and 7 of plaintiff's brief, is 28 U. S. C. A., Sec. 732, and reads as follows:

> "All suits * * * arising under the postal laws, shall be brought in the name of the United States."

The statutes in addition to those mentioned on page 7, et seq., of plaintiff's brief, from which the trial court deduced a Congressional intent and policy adverse to those contentions of plaintiff appearing on pages 93 to 119 of its brief, are quoted by that court in a footnote (75, 76), and are set forth in a footnote here.*

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* Section 35. Approval of bonds. The bonds of all postmasters may by the direction of the Postmaster General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster General or by the Fourth Assistant Postmaster General in the name of the Postmaster General. (39 U. S. C. A., Sec. 35).

THE POSTAL REGULATIONS INVOLVED.

In addition to the Postal Regulations referred to at page 9 of plaintiff's brief, the particular Postal Regulation under which Malone acted in delivering the letters in question to Hunting is Section 777. Plaintiff quotes only the first paragraph of that section (page 10, Plaintiff's Brief), but both the trial court (72) and the Circuit Court of Appeals (104) thought that the second paragraph of this Regulation covered this case. Paragraph 2 of Section 777 reads:

> "When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word "Personal" in connection with the address shall be delivered as other mail for the addressee is delivered."

Section 36. New bonds; application of payments. Whenever any postmaster is required to execute a new bond, all payments made by him after the execution of such new bond, may, if the Postmaster General or the Comptroller General deem it just, be applied first to discharge any balance which may be due from such postmaster under his old bond. (39 U. S. C. A. Sec. 36).

Section 37. Deficiency in accounts; notice to sureties. When a deficiency shall be discovered in the accounts of any postmaster, who after the adjustment of his accounts fails, to make good such deficiency, it shall be the duty of the General Accounting Office to notify the Postmaster General of such failure, and upon receiving such notice the Postmaster General shall forthwith deposit a notice in the postoffice at Washington, District of Columbia, addressed to the sureties respectively upon the bonds of said postmaster, at the office where he or they may reside, if known; but a failure to give or mail such notice shall not discharge such surety or sureties upon such bond. (39 U. S. C. A., Sec. 37).

Another Regulation considered pertinent by both the trial court (80) and the Circuit Court of Appeals (104) and omitted by plaintiff from those summarized on pages 9 and 10 of its brief is Section 816. That section reads:

> Sec. 816. "*The* loss, rifling, damage, *wrong delivery of,* or depredation upon *registered or other mail,* and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.
>
> 2. *When* the Chief Inspector finds that *the facts ascertained* in connection with such an investigation *establish the responsibility,* by reason of fault or negligence, *of a postal employee* or mail contractor or an agent or employee thereof, *the Chief Inspector shall demand the amount of the loss from such employee* or contractor.
>
> 3. The Chief Inspector in such cases shall communicate the facts to the officer having charge of the employee or service with information of any collection made or contemplated, for consideration of the advis-

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Section 38. Vacancies; appointment of successors; period of liability on bonds; temporary appointments. **Whenever the office of any postmaster becomes vacant,** the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change; and every postmaster and his sureties shall be responsible under their bond for the safe-keeping of the public property of the postoffice, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in **cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibility by giving notice,** in writing, to the Postmaster General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require, place such office in charge of a special agent until the vacancy can be regularly filled; and when

ability of imposing fine or of taking other disciplinary or corrective measures. The amount of the fine or the character of disciplinary action taken or proposed to be taken shall upon request be reported to the Chief Inspector by such officer.

4. When collection is made under the provisions of this section a receipt shall be given on a form furnished by the department showing the amount, the case number, a description of the mail, and the grounds on which the collection is based.

5. If after payment the propriety of the collection is questioned, the matter may be taken up by the person from whom the collection was made through his superior officers, but this shall be done within 30 days from the date of the collection. Any statement which it is desired to submit shall be forwarded promptly through official channels to the office having the employee or service in charge for transmission to the Chief Inspector; at the same time the officer with whom it is originally filed shall immediately notify the Chief Inspector that a statement has been submitted.

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such special agent shall have taken charge of such postoffice, the liability of the sureties of the postmaster shall cease. (39 U. S. C. A., (1939 Supp.) Sec. 38).

Section 40. Release of sureties on bond. If on the settlement of the account of any postmaster it shall appear that he is indebted to the United States, and suit therefor shall not be instituted within three years after the close of such account, the sureties on his bond shall not be liable for such indebtedness. (39 U. S. C. A., Sec. 40).

Section 44. Neglect to render accounts. Whenever any postmaster neglects to render his accounts for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, he and his sureties shall forfeit and pay double the amount of the gross receipts at such office during any previous or subsequent equal period of time; and if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond. (39 U. S. C. A., Sec. 44).

Unless the Chief Inspector sustains the propriety of the collection, the money shall be returned. This information shall be printed on the receipt mentioned in paragraph 4.

6. *If* full recovery is not made and *the Chief Inspector determines* that further proceedings should be had, *he shall present the facts to the Solicitor* for the Post Office Department *for advice as to* the advisability of *suit by the United States for recovery of the amount involved.* Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.

7. *All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.*

8. If the facts ascertained by the Chief Inspector establish an irregularity for which indemnity may be payable and recovery can not be made without materially delaying the settlement of the indemnity claim, he shall transmit the papers to the officer charged with consideration of such claims for certification or rejection."

The significance of this Regulation is that, if there be substance in plaintiff's claim that it be considered within the coverage of the bond in which plaintiff is not mentioned, this Regulation provides the course for plaintiff to pursue in seeking to recover.

In addition to Section 816, other Postal Regulations provide remedies to a private mail user by action within the Postoffice Department. They cover the various cases of loss that can arise through mishandling of the mails by carelessness or theft of postal employees. These regula-

tions with their interpolated statutes were helpful to the Circuit Court of Appeals in its construction of the intended coverage of the bond (106) and similarly helpful to the trial court (80). They show a complete code of administrative remedy available to plaintiff and make such suits as this needless. For its own reasons plaintiff omits them from its brief. The summary of them made by the trial Court is set out in the footnote below.*

ARGUMENT.

I. Plaintiff's Right to Sue Depends Upon Its Establishing that Congress Intended: (1) that patrons of the Post Office Department be covered by a Postmaster's Bond and (2) that such Patrons Should Have a Right to Sue in the Name of the United States without Its Consent; and (3) That such bonds should cover consequential Damages to Such Patrons.

The Postmaster General appointed defendant Malone as Acting Postmaster at Montgomery, Minnesota, and he accepted. That appointment and acceptance constituted an employment contract between Malone and the Government. The Postal Laws and Regulations enumerate the duties of

*It is evident that, by the adoption of various rules and regulations, the Government has endeavored to protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise. The payment of money to a postmaster on (fol. 103) postal savings, for instance, constitutes a direct obligation on the part of the Government to the patron. **Provisions are made for registering and insuring mail matter.** In Tit. 5 U. S. C. A., Sec. 392, as amended June 22, 1934, the Government has outlined a summary method of settling claims arising by reason of the negligence and misconduct of the postmaster, where the same may be settled for less than $500.00. In Tit. 31 U. S. C. A., Sec. 215,

Acting Postmasters. So, those statutes and departmental regulations became part of the employment contract between Malone and the Government and they defined his employment duties to his employer.

Collateral to that employment contract and pursuant to statute (39 U. S. C. A., Sec. 34), Malone entered into a second contract. He gave the Government the surety bond here in suit. Pursuant to statute (5 U. S. C. A., Sec. 377), that bond was "*made to and with the United States of America*", which is the only obligee named in the bond (19). The bond was conditioned as follows:

> "That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed upon him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed upon him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force." (19).

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and also found in Section 59 (2) of the Postal Laws and Regulations, the head of the department is authorized to adjust and determine any claim on account of damages to, or loss of privately owned property where the amount of the claim does not exceed $1,000.00, caused by the negligence of any officer or employe of the Government acting within the scope of his employment. The Postal Laws and Regulations under Section 59 (2) have promulgated detailed rules covering claims for such damages. Section 790, Tit. 39 U. S. C. A. and Postal Laws and Regulations No. 233 provide means whereby the postal department may distribute moneys that have been recovered through administrative action in instances where such moneys have been stolen from the United States mails. (80)

So, there are two contracts between Malone and the Government. The first and principal contract is the employment contract which defines Malone's employment duties by its reference to the laws and regulations which enumerate them. The second and collateral contract is the surety bond which is conditioned upon Malone's performances of those same duties owed to that employer.

The case at bar is an action on that surety bond. It is a contract action. It is not brought by the employer-obligee or with its assent. The question presented is whether the plaintiff has an original right to maintain this action on that collateral contract. To establish that right plaintiff, beyond showing injury, must show (1) itself to be an intended obligee of the bond and (2) a right to sue without the permission of the named obligee to use its name. Either of these two prerequisites may be shown by reference to the instrument or to the statutes calling for it. This rule is best shown by *Washington for the Use of M'Cue v. Young*, 10 Wheat. 406 (1825). That case was an action by the purchasers of a winning ticket in a lottery conducted by the City of Washington on the bond of the lottery manager. This Court held that:

> *"No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent given in fact or by legal intendment.* * * * We think upon general principles, they (i. e. plaintiffs) had no right to institute this suit without the consent of the corporation." (pp. 407-409)

That case establishes as plainly as language can indicate those two prerequisites. *First,* "no person who is not the

proprietor of an obligation can have a legal right to put it in suit, unless such right be given by legislature * * *." Applied to this case, plaintiff has no right whatever on the bond in suit unless it can establish that Congress has given it such a right. *Second*, "no person can be authorized to use the name of another, without his assent given in fact or by legal intendment." Applied to this case, that means that even if plaintiff can prove that Congress has given it a right on the bond in suit, still plaintiff cannot maintain the action in the name of the United States without further showing the express consent of the Government to use its name or consent by legal intendment.

The principles of that case, as will hereafter appear (infra, pp. 51-65) have been repeatedly and consistently applied by this Court and other courts and have never been receded from down to the present time.

The bond is to "pay to the United States." So the United States, not the plaintiff is the proprietor of the obligation. It does not by name or by description of a class refer to plaintiff. So it carries in itself no permission to plaintiff to sue upon it.

The statutes (39 U. S. C. A., Sec. 34; 5 U. S. C. A., Sec. 377) requiring the bond in suit does not expressly give private persons any rights under it. Their language suggests the contrary.* Consequently, it is incumbent upon

*39 U. S. C. A., Sec. 34: "Bond. Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

5 U. S. C. A., Sec. 377: "Form of Bonds and Contracts. All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America."

plaintiff to show that Congress has otherwise manifested an intention that plaintiff should have direct rights under the bond. By express statutory provision (28 U. S. C. A., Sec. 732), suit on the bond must be "in the name of the United States." Congress has not expressly consented to plaintiff's use of the name of the United States and the Government has refused its consent (84). Consequently, plaintiff must then establish such consent by showing inferential Congressional intention to grant such consent. It is strange that as respects these two things Congress should leave such important matters to inference and indirection. But in the absence of express provision in the bond or in statutes, or the Regulations made supplementing the statutes, that is what plaintiff is forced to do to establish the two necessary prerequisites mentioned.

In addition to these two prerequisites plaintiff must further establish that consequential damages such as are sought here are by inference from some Congressional utterance brought within the bond.

II. Factors Demonstrating that Congress Did Not Intend: (1) That Patrons of the Post Office Department Should be Covered by a Postmaster's Bond, or (2) That Such Patrons Should Have a Right to Sue in the Name of the United States Without Its Consent or (3) That such Bonds Should Cover Consequential Damages to Such Patrons.

Before discussing what the implications of the bond statutes and regulations do not show, we point out that they affirmatively show an intention that such bonds shall be put in suit only by the responsible officers of the United States.

1. *The surety contract in suit being collateral to an employment contract, the obligations under the surety contract are owed to the promisee in the employment contract—the Government.*

It is to be remembered that the surety bond upon which this action is brought is not an independent contract. Rather, it is collateral to the contract of employment between Malone and the Government. See supra, pp. 11-13.

An employee's employment duties may require him, on behalf of his employer, to deal with third persons. But the duties are *owed to the employer*. So, here Malone's duties under the principal (employment) contract required him to deal, on behalf of the Government, with patrons of the Government's postal service. But Malone's duties under that employment contract were owed to the Government, and not to its patrons. So, the surety contract in suit being collateral to the employment contract and the conditions of the surety bond being generally to perform the duties imposed on the employee-obligor by his employment contract with the obligee, and those duties being owed to the employer-obligee rather than to its patrons, it is plain that the purpose of the collateral surety contract is to secure *to the employer-obligee* the performance of those duties. That being so, it is equally plain that the obligations of the employee-obligor under the surety contract are owing to the employer-obligee, and not to its patrons. It follows, then, that the obligations of the surety likewise are to the Government, and not to its patrons.

2. *Upon familiar principles, the conditions of the bond indicate that it refers to duties owed to the Government rather than to patrons of the post office.*

The condition of the bond is as follows:

> "Now the Condition of This Obligation Is, That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force." (19).

The bond is conditioned upon the performance by Malone of three kinds of duties, viz., (1) as acting postmaster, (2) as fiscal agent of the Government, and (3) with reference to the Postal Savings System. Malone's duties in the second and third categories are obviously duties owing to the Government rather than third persons and have reference to the protection of the money and property of the Government. Construing by the rule *ejusdem generis*, it must be that Malone's "duties as acting postmaster" are also Governmental duties. Plaintiff claims that the language referring to "all duties" is the language that imparts plaintiff's right to bring this suit. (Pltf. Br., pp. 66, 72, 94, 112-113). If that be so, then the remaining two conditions of

the bond are not necessary. They become surplusage. The only way they can be given effect is to treat them as definition or explanation or illustration of the general language. The specific conditions (fiscal agent and Postal Savings) demonstrate that the general conditional duties as acting postmaster likewise refer to performance of duties owed to the Government.

Congress has provided:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." (5 U. S. C. A., Sec. 22).

Under that statute, and in the absence of any statute defining the duties of an "acting postmaster," we must look to the regulations of the Post Office Department to ascertain them. They are set out in the *Postal Laws and Regulations*, (1932 ed.), Sec. 416, as follows:

> "Whenever the office of a postmaster becomes vacant, through death, resignation or removal, the Postmaster General shall designate some person to *act as postmaster* until a regular appointment can be made * * *. *The postmaster so appointed shall be responsible under his bond for the safekeeping of the public property pertaining to the postoffice and the performance of the duties of his office* until a regular postmaster has been duly appointed and qualified and has *taken possession of the office.* * * *"

The other "duties of his office" as acting postmaster are nowhere defined. In the above quoted regulation, the single

duty specifically enjoined upon an acting postmaster and specifically addressed to his responsibility under his bond is "the safekeeping of the public property pertaining to the postoffice." That is a duty owed to the Government. The reference to the remaining "duties of his office" must likewise be taken as referring to duties owed to the Government rather than to patrons of the postal service. Otherwise the reference to the safekeeping of the public property becomes surplusage. (Among such duties is the protection of the Government's possessory interest in letters in its custody,—i. e. its special property as bailee of the letters. See pp. 75-76, infra.) No other "duties as acting postmaster" are defined.

So by the Regulations' definitions of the duties of acting postmaster the three conditions of the bond become four. Of the four, three specifically relate to duties owed the Government. The fourth is "duties of his office." Those duties are not elsewhere or otherwise defined. If the bond be paraphrased by substituting definitions for terms it is "to pay the United States conditioned upon Malone's performance of the duties of his office." That clearly means his duties to the United States.

To illustrate how plainly one must be designated by a bond or a statute in order to acquire a right to sue on the bond, even though he be incidentally benefited by it, the case of *Fosmire v. National Surety Company*, (1920) 229 N. Y. 44, 127 N. E. 472 is instructive. That was an action by a laborer upon the bond of a highway contractor. The bond was furnished pursuant to a statute requiring that it be conditioned for the payment of any direct or indirect damage claimed on account of the construction. The bond ran to the People of the State of New York and was conditioned that the principal should properly perform the con-

tract within the time limited and protect the State against damages growing out of the doing of the work "and if the above bounden principal * * * shall * * * pay in full the wages stipulated and agreed to be paid to each and every laborer employed by the said principal or by his agents, then this obligation shall be null and void." The Court will observe that the separate condition of the bond, apart from the condition to indemnify the State against damages, was to pay the very wages for which suit was brought. The New York Court of Appeals denied recovery. The late Mr. Justice Cardozo, in the course of the opinion, said:

> "*We think the cause of action is in favor of the people solely.* * * * In so holding, we put our decision upon the single ground that the bond, read in its entirety, is inconsistent with an intention that the plaintiff and others in like position should have the right to sue upon it. * * * A different question would be here if the bond had been conditioned for the payment of wages and nothing else. The interest of the state in the welfare of those who labor on its public works might then point to an intention to create a cause of action in their favor. * * * *The dominant purpose of this bond was protection to the state.* That is plain alike from its terms and from those of the statute which required that security be given (Highway Law, supra). This dominant purpose will be defeated if laborers may ignore the people, and sue in their own right.
>
> * * *
>
> "The plaintiff fails, therefore, to establish that he and his fellow laborers were the donees of a right to sue. * * * The concession of such a right would do more than frustrate the purpose of the bond. It would frustrate the purpose of the statute which directed that a bond be given. The statute does not per-

mit, and the commission in exacting the bond did not intend, that the security should be exhausted at the instance and for the benefit of persons other than the state itself. *What the defendant's liability would be if the action were prosecuted by the people we need not now determine.* That question is not here. (pp. 473-474) (127 N. E. 472).

The plaintiff in the case at bar is not mentioned in the bond. The plaintiff in the *Fosmire* case was, but could not sue. There being no right at common law to maintain this action, such right must be conferred by statute. But plaintiff has not indicated any such statute.

3. *The interest of the Government in the protection of its own money and property in the hands of postmasters forbids a construction which permits exhaustion of the Government's security by private persons.*

Postmasters are in possession of large sums of Government money. The importance to the Government of securing itself against the loss of such sums is evident. Indeed, plaintiff has at no time denied that the protection of the Government against loss of its money in the hands of its postmasters was the primary purpose of Congress in requiring bonds from its postmasters. However, plaintiff seeks to keep a foot in the door as a "secondary" or "subordinate beneficiary" of those bonds (Pltfs. Br., pp. 58-61). At the same time, plaintiff dismisses without any attempt at solution the intensely practical and important problem of determining how the Government's admittedly

primary interest is to be secured if private persons like the plaintiff have a right to sue on such a bond without even the consent of the Government to the use of its name. If plaintiff's position be adopted, no protection is left the Government in a case where a private action like the one at bar has completely exhausted the penalty of the bond. Any rule respecting the protection of the Government under these bonds must be general in its application. It is no answer to say, as plaintiff says, that no priorities between the Government and private claimants are involved in this particular case and that a solution of that problem may await a future case (Pltf. Br. pp. 3-4, 25, 56-57). Moreover, none of plaintiff's statements about the priorities here includes any reference to the record. Nothing in the record warrants such statements. Nothing in the record discloses whether the Government has a claim on this bond or not. Neither is it any answer to say, as plaintiff asserts, that the Government has taken a new bond from Malone as postmaster (Pltf. Br., pp. 25, 56). The new bond does not secure the performance of Malone's duties as *acting* postmaster, as does the bond in suit. That new bond begins only where the coverage of this bond ends. There is no escape from the fact that establishment of any right in plaintiff under the bond in suit will be at the expense of the Government for whose protection the bond was taken. Certainly such a result cannot be reached by "legal intendment". It is not reasonable to suppose that Congress intended that the protection of the Government under its postmasters' bonds should depend upon a race to the Court House.

Plaintiff's argument about "primary" and "secondary" "*beneficiaries*" of the bond is without basis. Neither the bond nor the statute so classifies its beneficiaries. The Circuit Court of Appeals and the trial court in this case and this Court in the *Howard* case (184 U. S. 676), all spoke of the "primary" *purpose* of the bonds. The Circuit Court of Appeals in this case and the Court in the *Foxmire* case spoke of the "dominant" *purpose* of the bond. All were seeking intent of the parties from their purpose. Once that intent was ascertained, the beneficiary and obligee were ascertained, and the purpose was no longer material. Neither court undertook to classify beneficiaries, or to hold that some secondary beneficiaries can sue when ascertained in part (no one in this case knows whether other misdeliveries occurred) without notice to the others. This idea of a hierarchy of *beneficiaries*, classified as are the creditors of a bankrupt, made up of unidentifiable grades and persons, finds no basis in the statute (none is suggested), or in the Regulations (none is suggested), or in the language of the bond (none is suggested), or in the language of any court (the opinions refer to "primary" *purpose*). Such classification of *beneficiaries* is purely a product of plaintiff's imagination. But unless such classification be imagined, then the Government's rights under the bond it required of its employee depend, according to plaintiff, upon the celerity with which it not only starts suit, but pursues it to judgment and collection. And plaintiff's rights would depend on its celerity against others. If, as plaintiff says, the consent of the Government is unnecessary to plaintiff's private suit, then no notice to the Government is necessary. So plaintiff, and others like it, could

sue without knowledge of the Government, and the Government would never know which postmasters' bonds had been exhausted by private suitors and which were still effective. Common sense forbids the finding of any such statutory purpose or intendment.

Plaintiff's brief (pp. 7-10) refers to certain statutes and regulations under which postmasters owe to the United States the duty to care for mail matter coming into their custody. From this plaintiff argues that the bond condition referring to "all duties and trusts" imposed by law or regulation is for the direct benefit of mail users. It is impractical to set forth all duties and trusts imposed by regulation or law upon postmasters. There are numerous statutes defining them. The Postal Regulations comprise 2,364 sections. Of the first 300 sections of those Regulations, 88 define, refer to or regulate postmasters in their care and custody of Government money and property (as distinguished from transactions with patrons of the Post Office) and in stating their accounts to the Government. Many of these 88 Regulations are divided into subsections and those therefore define more than one "duty and trust" of the postmaster with respect to Government money and property and accounts. The paragraph numbers of the Postal Regulations containing such references are given in the footnote below.*

In the course of the 2,364 Regulations and their definitions of postmasters' duties to the Government, numerous

*Postal Laws and Regulations: Secs. 58, 59, 65, 105, 106, 109-111, 113, 114, 116, 117, 119-124, 126, 129, 130, 133, 134, 137-139, 142-143, 148-159, 228, 235-239, 242-250, 252-254, 257-259, 262, 263, 265-274, 276, 277, 279, 282-284, 286-292, 296, 298.

references occur to Acts of Congress defining postmasters' duties in the care of Government money and property and in the stating of their accounts to the Government. In the first 300 of the 2,364 Regulations reference is made to 40 different sections of Statutes which define "duties and trusts" imposed by law upon the postmaster in the care of Government property rather than in the care of the affairs of postal patrons. References to those sections of the statute are made in the footnote below.* It is unnecessary to pursue the Regulations and statutes further. It abundantly appears that "the trusts and duties imposed by law or the Regulations" are those owed the Government. Those by the performance of which postal patrons may collaterally benefit are also owed the Government.

Two or three Regulations defining the obligations of bonds and the circumstances under which they shall be required of other employees of the postal establishment are significant for the light they throw upon the duties and trusts referred to in the condition of the bond in the case at bar.

The condition in the bond of the postmaster here in suit is defined by statute and regulation. Regulation No. 66 provides:

> "In addition to the postal employees in * * * the postal service required to give bond under specific provisions of law the Postmaster General may, *whenever he deems it to the best interests of the Government*, require any other person employed in * * * the postal

*5 U. S. C. A., Sec. 331; 5 U. S. C. A., Sec. 378; 6 U. S. C. A., Sec. 4-5; 18 U. S. C. A., Sec. 331; 26 U. S. C. A., Sec. 907(a); 28 U. S. C. A., Secs. 489, 671, 737, 775; 31 U. S. C. A., Secs. 44, 71, 73, 74, 112, 116, 119, 528, 773; 39 U. S. C. A., Secs. 36, 41-45, 49-50, 54, 62, 65-66, 168, 172, 275, 361, 731, 735, 783, 789, 822.

service to give bond to the United States in such form * * * as he shall prescribe."

The circumstance which shall require these bonds is "the best interests of the Government", not the desires or needs of postal patrons. And the employees to whom that test is applied may be handling patron's mail,—e. g. special delivery messengers.

The Act of Congress of June 22, 1906 (34 Stat. 438), embodied in Regulation No. 13, par. 2(b), provides that the Superintendent of Finance of the Postal Department shall give bond in such amount as the Postmaster General shall determine "for the faithful discharge of his duties". The duties of the Superintendent of Finance are obviously duties to the Government. He has no contact with postal patrons. Yet the statutory condition of his bond is similar to that in suit.

A similar bond is required of the Purchasing Agent of the Postoffice Department by Regulation No. 88 and 5 U. S. C. A., Sec. 366, who has no contact with patrons' mail.

Regulation 10, par. 7, defines some of the duties of the Disbursing Clerk of the Postoffice Department and requires that he shall give bond for the discharge of certain fiscal duties "and for the faithful discharge of the duties of his office according to law". The phrase is similar to that in the condition in the bond in the case at bar. The duties embraced in it are obviously duties owing to the Government and not to any postal patron.

The Act of Congress (39 U. S. C. A., Sec. 686) embodied in Postal Regulation No. 27 is "whenever a post office inspector is required to collect or disburse any public money, he shall, before entering upon such duty, give bond in such

sum and form, and with such security, as the Postmaster General may approve". The Congressional intent that the bonds of inspectors shall be for the purpose of safeguarding public money and that only is apparent. The duties of postal inspectors with reference to postal patrons are numerous and defined by regulations, but with respect to them Congress requires no bond.

The Act of Congress (39 U. S. C. A., Sec. 132) embodied in Regulation No. 472 refers to such post offices as the defendant Malone had in charge. Its pertinent parts are:

> "Assistant postmasters * * * at * * * third-class post offices, and *when deemed necessary by the Postmaster General for the better protection of the interests of the Government any other employees* in such offices, shall, * * * give bond to the United States * * * in such penalty as the Postmaster General shall prescribe, *conditioned for the faithful discharge of all duties and trusts imposed upon them either by law or the rules and regulations of the Post Office Department.*"

Assistant postmasters and other employees in post offices have as much to do with the mail of postal patrons as have postmasters. As to other employees of a third-class post office when a bond is required of them, the statutory condition of such bond is precisely and verbatim the condition of the bond in the case at bar. But the test of the circumstances which may require such a bond with that condition is defined by Congress to be "when deemed necessary by the Postmaster General for the better protection of the interests of the Government". It is thus seen that the Congress in exacting bonds of employees who have the same duties respecting the patron's mail as had Malone

as acting postmaster, looked only to the interests of the Government.

Regulations, Sec. 473, implements the foregoing statute. It provides that the bonds will be given to the United States by employees of the Post Office to cover "the faithful discharge of all duties and trusts imposed upon them" and "due accounting of all moneys." It further provides that the amount of the bond shall be in accordance with the "financial responsibility". It further provides that when the "financial responsibility" be increased, the bond shall be increased. The "financial responsibility" referred to is obviously the duty owed the Government and not the postal patrons by the employees in question. This is emphasized by subparagraph 6 of that Regulation which provides:

> "It shall be the duty of postmasters at * * * third-class post offices to see that only clerks and employees who are under bond are permitted to handle money, stamps, registered mail and other valuable matter."

Similar provisions appear in subparagraph 7 of the same Regulation. They make it appear that the purpose of the bond is to protect the money, stamps, etc., of the United States. All of these bonds are of course to be conditioned as required by the foregoing statute. The condition is the same as the case at bar. It is exacted only when the best interests of the Government require it.

It is thus apparent that the numerous Acts of Congress requiring postal bonds with similar conditions to that of the case at bar have no reference to the postal patrons except as they may be incidentally benefited by the performance of Governmental duties. The "better protection of the

interests of the Government" is the Congressional expression of purpose in requiring bonds of mail handlers.

4. *Omission of Congress to expressly provide for suit by private persons on Post Office bonds indicates its intention to grant no such right, since Congress has made express provision for such suits upon other kinds of bonds.*

When Congress required that the bond in this case be "made to and with" the United States, it acted in full knowledge that many users of the mails would be affected by postal employees' deviations from the Postal Laws and Regulations. Its failure, then, to provide that such users might sue upon postal bonds must be taken to be more than an inadvertent omission or a reliance upon implication. It must be recognized as a deliberate reliance by Congress upon the common law which denied such third persons a right to sue on surety bonds when not named or designated as obligees. This follows from the fact that when Congress, in dealing with other statutory bonds, has intended that third persons should be able to sue thereon, it has expressly so provided. Illustrations are the statutes requiring bonds of bankruptcy referees, receivers, trustees and designated depositaries (11 U. S. C. A., Sec. 78(h), United States marshals (28 U. S. C. A., Sec. 500), materialmen on public contracts (Smith-Hurd Act, 40 U. S. C. A., Sec. 270), consular officers (22 U. S. C. A., Sec. 103), warehousemen (7 U. S. C. A., Sec. 249), marshals of consular courts (22 U. S. C. A., Sec. 171), officers wrongfully destroying distiller's property (26 U. S. C. A., Sec. 1204), notaries public (48 U. S. C. A., Sec. 33), consular officers representing decedents or incompetents (22 U. S. C. A., Sec. 78), and

so on. The absence of any provision expressly granting to private persons the right to sue on Post Office bonds, taken with the repeated enactment of express statutes over a long series of years when it was the intention of Congress to grant such right, demonstrates the absence of that intention here. The departure from practice shows the purpose.

5. *Suit must be in name of United States.*

In addition to the foregoing manifestations of the Congressional intention that private parties should have no original rights under Post Office bonds and that they should have no right to sue thereon, Congress has expressly provided that "* * * all suits arising under the postal laws shall be brought in the name of the United States" (28 U. S. C. A., Sec. 732). Plaintiff has recognized the application of that statute to the instant case by its attempt to appropriate the name of the Government to its personal use in bringing this action.

Implications of that statute are not difficult to discern. Even in a case where private persons had substantive rights under an official's bond and a right to sue thereon after permission granted, the action "was brought * * * in the name of the United States, at the relation and to the use of David D. Stewart" (*Howard v. United States* (1902) 184 U. S. 676, 680) although no statute expressly required that action to be brought in the name of the Government. The enactment, then, of such a statute indicates that the Congress intended to require something additional in cases like the one at bar to which it expressly applies. The fair inference must be that Congress, by enacting such an addi-

tional requirement for this case, specified that the rights to be enforced under a postal bond should belong to the Government and that the Government alone should have a right to sue. The quoted statute was construed in *Williams v. Wells Fargo and Company Express* (C. C. A. 8-1910) 177 Fed. 352. That action was by an "informer in his own behalf and on behalf of the United States" (p. 353) to recover a penalty arising under the Postal Laws. Since the quoted section (28 U. S. C. A., Sec. 732) forms a part of the procedural act of the federal courts and by its express terms commands that all such suits shall be brought "in the name of the United States", the court held that "no other person than the United States may bring and prosecute" it (p. 356). This statute and construction are both sound and practical in their application here. Otherwise, the obligee named in the bond might sue as defendant its own employee whom, on investigation, it has already found blameless. It is apparent that no legal intendment that plaintiff should have the right to appropriate the name of the United States to plaintiff's personal use and to sue on this bond can be spelled out of that situation.

This statute (28 U. S. C. A., Sec. 732) does more than manifest a Congressional intention contrary to plaintiff's suggestion. It does more than suggest that "the law making power in its wisdom deemed wise that the lawfully constituted authorities of the government should act on their official responsibility in cases" (177 Fed. 352, 356) arising under bonds "made to and with the United States". It prohibits this action.

The statute (28 U. S. C. A., Sec. 732) in full reads:

> "All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or for-

> feiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States."

Reading it shows that it refers to three kinds of cases: (a) all suits to recover duties, taxes, and imposts; (b) those suits which are to recover penalties under certain described Acts; and (c) all suits arising under the postal laws.

If this be a suit arising under the postal laws, then this statute applies. This is a suit under the postal laws. The plaintiff so averred in his complaint commencing the action (4). Otherwise there would be no Federal jurisdiction, since the plaintiff and defendant Malone are both Minnesotans. So if it be decided that this be not a case "arising under the postal laws", there is nothing to do but to dismiss for want of Federal jurisdiction. But this plaintiff claims his right to sue this surety is given (a) by the implications or construction of the Federal statutes defining the obligee of such bonds, (b) by the implications or construction of Federal statutes defining the coverage of such bonds, and (c) by reason of the principal's wrong on the plaintiff, which plaintiff says consisted of violations of Federal statutes and of Postal Regulation Section 777 (2), as plaintiff construes it. See *Howard v. United States*, 184 U. S. 672, 681.

Therefore, since the case arises "under the postal laws", this statute governs it. Since the statute governs, then the suit must be brought "in the name of the United States". The only judicial construction which those words of this statute have received is that "the lawmaking power, in its

wisdom, deemed wise that the lawfully constituted authorities of the government should act on their official responsibility in cases of violation of the postal laws", and that those words mean "by the United States". *Williams v. Wells Fargo & Co. Express* (C. C. A. 8-1910) 177 Fed. 352, 356.

To meet the effect of this statute, plaintiff suggests (Pltf. Br., pp. 150, 151): (a) that the statute applies only to suits for penalties and that this is not such a suit, and (b) that this suit is brought by it "in the name of the United States".

As to (a). To be sure, this is not a suit for a penalty. But the statute does not refer only to suits for penalties. Of the three kinds of suits it refers to, one kind relates to certain suits for certain penalties. The other two kinds have nothing to do with penalties. That is perfectly plain, as a reading of the statute will disclose.

As to (b). If to bring a suit in the name of the United States against the will of the United States is to comply with the statute, then the statute is meaningless. The Attorney General refused to bring the suit. He is the officer charged by law with the bringing of suits in which the United States is involved. (5 U. S. C. A., Sec. 306). No officer of the United States ever consented to plaintiff's use of the Government's name. On the contrary, such consent was requested (59) and refused (84). The plain purpose of the provision is to keep such suits under official control. That purpose is subverted by this plaintiff's construction. If "all suits arising under the postal laws" (28 U. S. C. A., Sec. 732) may be brought by private persons usurping the name of the United States, so may "all suits

for the recovery of any duties, imposts, or taxes, * * * or for the enforcement of any penalty or forfeiture provided by any act respecting * * * the internal revenue" (Ibid). So may actions in the nature of quo warranto. The grouping by this statute of cases arising under the postal laws together with cases to recover taxes or penalties shows the Congressional conception of them all as similar, and shows that the words "in the name of the United States" mean "by the United States". Just as any ordinary person would think. That statute *prohibits* this action.

At one time plaintiff thought so. But it now contends that Congress impliedly has given postal patrons a right to sue on the Government's bond so that any other consent of the Government to the use of its name by plaintiff, is unnecessary. Yet, plaintiff labors to explain the "Government's attitude" (Pltf. Br., pp. 10-12). If plaintiff's present contention were sound, the "Government's attitude" would be immaterial.

Furthermore, doubt as to plaintiff's good faith in its present argument is necessarily created by its prior conduct. Although the complaint is dated July 14, 1936 (18), it was not served until October 5, 1936. But, on "July 15, 1936, counsel for plaintiff wrote to the *Attorney General* a request for authorization to commence the suit (59)." (Pltf. Br., p. 11). The explanation by plaintiff's counsel of the reply to that request falls somewhat short of complete candor (57-61). In fact, it is not at all a "reply by the Attorney General," but rather it is "a letter from the Department of Justice" (author unknown or at least unidentified) "dated September 22, 1936" (58) upon which plaintiff now

relies to convince this Court of the "Government's attitude toward suit" (Pltf. Br., p. 11).

There is neither allegation, nor proof, nor finding that the Attorney General ever consented to plaintiff's usurpation of the Government's name in this suit, or that he ever indicated that such consent was not necessary to enable plaintiff to maintain this action. The trial court found that "the Government has refused to give its consent to the bringing of this suit," and the United States District Attorney as *amicus curiae* filed a brief "in support of the defendant surety company's position that the plaintiff had no right to bring this action on this bond" (84). It is neither necessary nor proper to follow plaintiff outside the record discussing the District Attorney's brief. There should be no more consumption of time or paper attempting to define the "Government's attitude toward suit." The Government's action defines its attitude. Plaintiff's conduct in requesting the consent of the Government to the maintenance of this action is an actual construction by plaintiff of the statutes which it now seeks this Court to otherwise construe. Plaintiff's conduct compels a suspicion that its present contention (that Congress impliedly has given it a right to sue and that actual consent of the Government is unnecessary) has been born since July 15, 1936, and was sired by necessity.

At all events the statute (28 U. S. C. A., Sec. 732) is not met.

6. The Postal Regulations provide an exclusive remedy for plaintiff.

The statute (5 U. S. C. A., Sec. 392) and the Postal Regulations (Sec. 58) made pursuant to it, provide a summary method of settlement by the Postmaster General of all claims arising from negligence or misconduct of postal employees, including such claims as he once here made, that can be settled for less than $500.00 The settlement is made by administrative action within the department and covers all simple claims of every kind. The individual items of claim here asserted by plaintiff fall well within this authority.

For claims against railways for damages for losses in the mails, certain other Regulations are provided. (Postal Laws and Regulations, Sec. 1860-1862). Although these Regulations do not state that they shall be the exclusive remedy, the courts have held that they are, and that the administrative action which they provide is the only remedy either of the user of the mails or of the United States, whether suing in its own behalf or for the ultimate benefit of the user of the mails. *United States v. Atlantic Coast Line R. Co.* (C. C. A., 4—1914) 215 Fed. 56; *Union Pacific R. Co. v. United States* (C. C. A., 8—1915) 219 Fed. 427, particularly page 437; *United States v. United States Fidelity & Guaranty Co.*, (C. C. A., 6—1918) 247 Fed. 16, 19.

By statute (39 U. S. C. A., Sec. 790) and Sec 233, of the Postal Regulations, provision is made for the Post Office Department distributing among the persons entitled thereto any moneys stolen from the mails and recovered by the Department through administrative action. This statute and Regulation very clearly contemplate that the United States

shall bring the suit to recover moneys stolen from the mails, whether by Postmasters or other postal employees, no matter whose money it was and regardless of the fixed liability of the Government to the private mail user. Were it not for this statute, the money received would not be in the hands of the Post Office Department for distribution among the "proper persons or owners to whom the moneys shall be restored" as specified by the Regulations, but would come direct to the hands of those persons or owners by their suit on the bond, if plaintiff's contentions are correct.

The statute or regulations last mentioned do not cover cases like this, i. e., damages arising through alleged negligence of postal employees as distinguished from theft of mail or its contents by such employees. However, *Section 816 of the Postal Regulations specifically covers loss by misdelivery.* It provides for suit by the United States and the distribution by the administrative officers of the Post Office Department among the persons damnified by "the loss, rifling, damage, *wrong delivery of,* or depredation upon registered or *other mail,* and the failure to collect or remit C. O. D. funds." This section is sufficiently broad, and no need exists for plaintiff to ignore the Regulations and invoke the aid of a court to seek redress for its claimed losses. This view is well sustained by Sec. 10 (8) of the Postal Laws and Regulations, defining the duties of the Solicitor of the Post Office Department, which include advice to the Postmaster General respecting claims for damage done to persons or property by or through the operations of the Post Office Department and questions of law or relating to prosecutions or suit affecting or arising out of the Postal Service. Certainly this grant of authority includes suits upon bonds such as we have here, as well as claims

arising from the matters specified in Sec. 816 of the Postal Regulations.

These and similar interconnected statutes and regulations adopted pursuant thereto comprise a consistent whole. They provide the means and the method whereby the Postal Department can handle the many claims arising from the use of the mails. In addition they provide for recovery and ultimate distribution among the persons found entitled thereto of the proceeds of official bonds to cover losses, whether they arise through the negligence or other fault of a mail contractor, or through the fault; negligence or misdelivery of mails by a postal employee. In all such instances adminstrative action is provided, and no intendment can be claimed that court action by private mail users such as we have here was ever contemplated.

The same considerations as moved the court in the *Atlantic Coast Line* case, supra, and the *Union Pacific* case, supra, in arriving at the conclusion that where regulations covered the subject-matter of a claim and provided a remedy, that remedy must be taken to be the exclusive one, even though the regulation did not so state, should move this Court to the conclusion that the remedy provided by the Postal Regulations above referred to is the exclusive one, and that court action to procure the same result is an unwarranted interference with the functioning of the Post Office Department. Any other conclusion would create an anomolous situation; the statutes and regulations set up to provide administrative relief in every class of claim arising out of the handling of the mails, would be set at naught and the clear intent of relief by administrative action ignored.

These views are well stated in *Globe Newspaper Co. v. Walker* (1907), 210 U. S. 356, where this Court, considering the federal copyright laws and the remedies provided thereby, quoting from Pollard v. Bailey, 21 Wall. 520 said:

> "A general liability created by statute without a remedy may be enforced by an appropriate common law action, but where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

See also *United States v. U. S. F. & G. Co.* (C. C. A. 6—1918), 247 Fed. 16; *United States v. Smelser* (C. C. A. 5—1937), 87 Fed. (2) 799; *Dunn v. O'Connor* (C. A., Dist. of Columbia, 1937), 89 Fed. (2) 820; *Wilcons v. Penn Mutual Life Ins. Co.* (C. C. A. 10—1937), 91 Fed. (2) 417.

Confronted with the established and exclusive administrative procedure for recovering losses such as this the necessities of plaintiff's case compel it to deny that Section 816 is the exclusive remedy for its claimed loss (Pltf. Br., pp. 158-161). Plaintiff begs the question in this litigation by arguing that "Sec. 816, having been adopted by a mere administrative department of the Government, could not limit a *right to sue given by Congress* * * *." The existence of such a right to sue is a basic question in this case—but plaintiff's argument assumes the existence of such right. And such a right, of course, must be "given by Congress" —but plaintiff assumes it has been given without indicating the Congressional action which conferred that right.

The history of Section 816 clearly demonstrates the Congressional sanction under which it has existed for fifty years since 1872. The Post Office Department has issued, from time to time, printed regulations. It is believed that

the substance of what is now Sec. 816, Postal Laws and Regulations (1932), was included in the codification and revision of the postal regulations which were prepared in the early 1890's under the supervision of the then Solicitor for the Post Office Department, H. H. Glassie. In 1913, Congress affirmatively recognized the existence of those regulations and the operation of the postal service under them, by specifically authorizing the printing and publication of them. What is now Section 816 was included in the Congressionally authorized 1913 compilation as Section 144. Thereafter Congress revised the Postal Laws in 1921. (Act of June 10, 1921, Chap. 18, Sec. 304, 42 Stat. 24). It did not change that regulation.

It is presumed that when the Congress legislates it does so with knowledge of the state of prior and existing usages and laws with respect to the subject of its legislation. *National Lead Co. v. United States*, (1919) 252 U. S. 140, 147. When Congress codified, revised, and *re-enacted* the postal laws (including the bond statutes) in 1921 (39 U. S. C. A., Sec. 34; Act. June 10, 1921, Chap. 18, Sec. 304, 42 Stat. 29), it did so with knowledge of the then operation of the Post Office Department under the Regulations of 1913 (including Sec. 144—now Sec. 816). That demonstrates the Congressional approval of the Department's practice—now established for nearly a half century—of regarding the present Section 816 as the sole remedy available to postal patrons for losses of the type claimed by the plaintiff. Compare *Helvering v. Winmill*, (1938) 305 U. S. 79, 82-83. Congress has twice repeated that sanction by authorizing the printing of the revised Regulations again in 1924 (see Sections 134 and 635) and still again in 1932 (see Section 816).

The statutory authority granted to the Postmaster Gen-

eral (5 U. S. C. A., Sec. 22) and the Regulations promulgated pursuant thereto are of long standing and have been sanctioned by Congress. They provide an efficient administrative remedy in proper cases and must be taken to be the only path open to this plaintiff.

7. *Registry, insurance, and other provisions for the protection of mail users evidence the intention of Congress that postmaster's bonds should be for the exclusive protection of the Government.*

As pointed out by the trial court (80), supra, (footnote p. 11), extensive and express provisions for the protection of postal patrons make it evident that the mail user was not the forgotten man in the Congressional considerations of the operation of the postal service. So does the quotation on page 105 of plaintiff's brief. It is plain that adequate, express provision has been made for postal patrons without resorting to the surety bonds which are for the protection of the Government. The above provisions for the protection of postal patrons leave nothing to implication. What warrant, then, is there for assuming that Congress acted otherwise with respect to the employee's bonds and left to judicial inference as "legal intendment" a supposed right of such patrons to sue on the employees' bonds? It is more reasonable to suppose that if the Congress had intended postal patrons to have any rights under such bonds, it would have been as explicit in manifesting that intention as it was in expressing its intention that the provisions noted above by the trial court should operate for the protection of the patrons.

8. *The absence of any relation between the penalties of postmaster's bonds and the possible consequential damage to patrons from the loss of mail evidence a lack of intention that such patrons and losses be covered by the bonds.*

The statute requires that postmaster's bonds shall be "in such penalty as the Postmaster General shall deem sufficient" (39 U. S. C. A., Sec. 34). It cannot be supposed that the Congress has not known that the penalties deemed sufficient by the Postmaster General are but a small fraction of the penalties which would be necessary if postmaster's bonds were to cover not only the Government's property in the hands of postmasters, but also the value of all contents of all mail matter, and in addition the value of all contracts, bargains, marriages, social and business engagements, and the infinite matters and events which are consummated by use of the mails. Yet it is to recover the value of the latter kind of benefit that this action is brought. Certainly Congress has known that the Postmaster General was not requiring penalties sufficient to protect mail users against such losses. That being so, the failure of Congress itself to establish the penalties of postmaster's bonds strongly suggests that Congress has never intended that they should cover such losses. In this very case a $34,000 loss is claimed of a third-class postmaster in a town of one thousand population. The Postmaster General had required a bond of $16,000 to cover the Government's money and property. The failure of Congress itself to require larger bonds when the Postmaster General was setting penalties on the basis of the amount of Government property to be protected, indicates that Congress intended the bonds to be a protection against losses to the Government only.

9. *Failure of Congress to adjust premiums to increased liability claimed by plaintiff indicates no intention to impose such liability.*

The statute fixes the premiums payable for the bond (6 U. S. C. A., Sec. 14). It has been at the same rate for thirty years. The rate does not bear any apparent relation to the hazards of liability such as plaintiff claims. The rate of premium can, however, be considered as roughly proportionate to the government money and property coming into the hands of various grades of postmasters. If liability such as plaintiff claims really was intended, one would expect the premium rate to increase as has commerce and consequent hazard in the past thirty years.

10. *Plaintiff's Claim is without Precedent and Inconsistent with the Understanding of the Profession and the Practice of the Government for a Century and a Half.*

Plaintiff's brief cites 166 cases from this country, Canada, and England. Plaintiff's research goes as far back as 1633 (Pltf. Br., p. 100). But, plaintiff's brief is barren of any reference to any adjudicated case anywhere imposing upon any postal employe any liability to his employer or anyone else under his bond for any consequential damages such as it claims. Defendant's counsel has been unable, after diligent search, to discover any such case. In the light of the uncalculated but certainly considerable number of letters which have been delayed, misdelivered, or lost in the three centuries of the operation of the English and American postal services, it is significant that there is no trace of any claim such as plaintiff's ever having been sustained. Plain-

tiff's research does not disclose when the first postmaster's bonds were furnished, but *Postmaster General v. Early*, (1827) 12 Wheat. 136, 151, indicates that they were taken, if not required, prior to 1799, and that case recognizes that "they are for money due to the United States" (p. 152). Nearly a century and one-half of opportunity for this kind of a claim to arise in this country has produced no case to establish plaintiff's claim. The absence of such a case over so prolonged a period of time and in the midst of a countless number of transactions which could give rise to such a claim strongly indicates that there is no basis for such a claim. The "strong presumption" recognized in *Western Union Telegraph Co. v. Schriver*, (C. C. A. 8—1905) 141 Fed. 538, is particularly applicable here. There, the court said:

> "No authority is cited by Mr. Thompson, the diligence of counsel has presented, and our research has discovered, no decision of any court, except the judgment of the court now under review, which has ever sustained an action or a judgment against a telegraph company for loss inflicted upon the undisclosed principal of an addressee by reason of the negligence of the telegraph company in handling the message. This pregnant fact raises a strong presumption that, when this message was received and transmitted, it was not the law that the company was liable for negligence to the undisclosed principal of the addressee. If it had been judgments founded upon it would probably not have been lacking." (p. 543).

Contrasted with the lack of precedent for plaintiff's claim is the generous number of cases concerning actions by mail [illegible]s against postmasters on common law grounds of tort and actions by patrons against telegraph companies

for misdeliveries, but not on the bonds of employees. Section 816 of the Postal Laws and Regulations (discussed more fully on pages 37-41, supra) provides an administrative remedy for mail users who have suffered loss by reason of the misdelivery of mail. That remedy has been available and used for about a half century. The absence of any cases involving actions on postmaster's bonds of the type here asserted, and the abundance of litigation against postmasters and telegraph companies on common law grounds, and the history of Section 816 of the Postal Laws and Regulations demonstrate that the claim of this plaintiff is contrary to the understanding of the courts and profession and the practice of the Post Office Department. Such a contrariety of position between this plaintiff and all others in the past suggests that it is this plaintiff which is not in a tenable position.

11. *Statement of Plaintiff's Claim Defeats It.* This action is for the full penalty of a postmaster's bond. It is for consequential damages for misdelivery of mail, and not for the intrinsic value of the matter lost. If the surety must pay the plaintiff, it will be subrogated against the postmaster for the amount of such payment. So the impact of plaintiff's claim will be borne by the postmaster. Since the claimed liability is in contract, it would attach even though the postmaster were without negligence and had acted in utmost good faith to comply with the numerous rules of his employer (See Pltf. Br., pp. 79-85). It must be plain, then, that plaintiff contends that Congress intended to impose upon its postmasters, without even troubling to say so in express terms, the tremendous liabilities which the principle of plaintiff's position entails. Any postmaster would

doubtless be surprised to learn that he had assumed this unexpressed and covert liability, and would think it unfair that neither Congress nor the Regulations had warned him of it in terms.

Plaintiff deposited in the mail certain letters to be delivered through defendant Malone's post office. The letters were of little or no value in themselves. Plaintiff itself did not consider them sufficiently valuable to warrant the expenditure of a few pennies of its own money for registration or insurance. When they arrived at defendant Malone's post office, there was nothing about the appearance of plaintiff's letters to disclose to the most prudent person that they contained or related to anything of value. Malone delivered those letters in a manner which he was "convinced" was "perfectly proper" (72). Subsequently, it turned out that the person to whom he had delivered them was engaged in perpetrating a criminally fraudulent scheme on the plaintiff. It further turned out that as a result of such third person's crimes and the use he made of Malone's subsequent and innocent misdeliveries, plaintiff's investment in a few three cent stamps had developed into a claim against the postmaster for over $34,000 (18). If plaintiff had dealt in bond issues instead of automobile paper, Malone's claimed liability would have been greately increased. If plaintiff had been one of the billion dollar institutions of the country, Malone's claimed liability would have been incalculable. And yet, so plaintiff claims, Congress intended to impose such staggering liability on country postmasters without troubling to plainly say so, but left the ascertainment of such intention to an implication to be spelled out in 165 pages of printed brief.

The omission of Congress to provide expressly for such far reaching contract liability beyond that independently existing demonstrates its intention that no such liability should be imposed. This is strikingly confirmed by the case cited on page 30 of plaintiff's brief, *United States v. Atlantic Coast Line R. Co.* (C. C. A. 4, 1914) 215 Fed. 56. That action was brought by the United States in its own interest and in the interest of the senders of certain pieces of mail matter against the Railway Company through whose negligence the mail matter in question was lost. The Railway Company carried the mail under a Government contract and had paid the Government five hundred dollars as a fine imposed by the Postmaster General "in full payment, accord and satisfaction therefor" (p. 58). Despite this, the Government sued to recover for the owner the value of certain diamonds in the mail so lost. The court denied recovery and said:

> "There is a very strong presumption that if the intention had been to impose upon railroad companies the very onerous obligation of being responsible, *this obligation of such vast consequence to both parties would have been clearly and directly expressed in the regulations.*"

So here, there is an equally strong presumption that if the intention of the Congress had been to impose upon postmatters or their bondsmen the onerous obligation of being responsible for the value of all contracts sent through the mails or that might be consummated by mailed acceptance of an offer, or for credits mistakenly extended in the course of the use of the mails, this obligation would have been clearly and directly expressed. Considering this very point, the court in the last cited case said:

"The absence of such expression creates a strong implication that it was not the intention to impose such liability. The implication against liability in such case is strongly indicated in German etc. Co. v. Home etc. Co., 226 U. S. 220; Atchison T. & S. F. Ry. v. United States, 225 U. S. 640. This view is further supported by the fact that *where the Government intends to impose such liability it is usually expressed in the written undertaking exacted from the party who undertook to carry the mail.* * * *"*

So here, if there had been an intention to impose upon the postmaster or his bondsmen liability to third persons for whatever they might send through the mail, or for whatever acts or omissions users of the mails might invite by their missives, surely Congress would have so stated in express terms.

Plaintiff's claim that Congress left to obscure implication an intention to impose such an extraordinary liability on its postal employees does violence to this Court's common experience concerning the care with which Congress has drafted the postal laws. If plaintiff is right, then Congress has expressly provided for notice to the surety in case the postmaster were short in his postage stamp accounts (39 U. S. C. A., Sec. 37), but has not provided for such notice in the event that a misdelivery entailed a hundred thousand dollar consequence. Congress has expressly provided that the passage of three years discharges the surety if there is an indebtedness to the United States, whose inspectors check the postmaster (Ibid., Sec. 40), but has failed to provide for the surety's discharge by any passage of time in the event of unverifiable claims based upon

the consequences of misdelivery of undisclosed mail. And so on.

12. *Bond Does Not Cover Mail User's Consequential Damage.*

There is no language of any statute, regulation, or bond condition which—in any manner or degree—indicates that Congress ever intended that mail users' consequential losses should be covered by postmaster's bonds. [Not only is there no such language respecting suits by mail users, but there is no such language providing for suit by the Government for consequential damages either, in its own behalf or on behalf of mail users. In the one particular case found in which it is contemplated the Government shall recover consequential damages in its own behalf, a special Regulation so provides (Postal Laws and Regulations. Sec. 1426, relating to money order blanks)]. It follows, then, that even if this plaintiff were intended to be an obligee of the bond, and even if this plaintiff were granted a right to sue in the name of the United States, still Congress never intended postmasters' bonds to cover claims of the type here asserted.

This loss, claimed, to be derived from the nature of the contents of sealed mail and from the subsequent crimes of another, was not to be anticipated by the handler of ordinary mail. It was far beyond the reasonable hazards of handling ordinary mail. Elementary rules of damages bar recovery for such losses. If Congress intended postmaster's bonds to cover losses not collectible in the absence of statute, surely Congress would have plainly said so. It is for plaintiff to establish his claimed right. Plaintiff points to no language in any statute, Postal Regulation or bond condition which,

expressly or by implication, discloses an intention that postmaster's bonds should cover such losses. There is no such language.

That the common law liability of the carriers of missives does not extend to damages not apparent from the face of the missives themselves is illustrated by *Kerr S. S. Co. v. Radio Corporation of America*, (1927) 245 N. Y. 284, 157 N. E. 140. In that case the plaintiff delivered to defendant a code message for transmission to a ship captain. Deciphered, the message instructed the captain to pick up a certain cargo. Defendant lost the message. As a consequence, the captain did not pick up the cargo. Plaintiff sued for the freight lost, but recovered only the price paid for the cablegram. Consider the case at bar. This plaintiff mailed letters which, being in plain envelopes, were as code to any postmaster handling them. Defendant Malone did not deliver them to the addressees. As a consequence, plaintiff failed to discover for a time that contracts which it previously had purchased and paid for were forged. Now plaintiff seeks to recover from that innocent postmaster, to whom the nature of the letters was unknown and could not lawfully be known, the money so paid by it to a third person prior to the mailing of the letters.

The loss here claimed is more remote than the loss claimed in the *Kerr* case. Here, plaintiff had paid its money prior to the mailing of the letters. As a consequence of the misdelivery of the letters, plaintiff lost only some time in pursuing the money previously paid out to the perpetrator of a criminal fraud on it.

Writing for the New York Court of Appeals in the *Kerr* case, the late Mr. Justice Cardozo said:

"* * * where the terms of the message give no hint of the nature of the transaction the liability is for nominal damages or for the cost of carriage if the tolls have been prepaid." (157 N. E. 141)

The hazard of loss such as here claimed was not apparent and could not be apparent to the postmaster. It is fair to assume that it was not apparent to the plaintiff. Otherwise plaintiff would have insured or registered the mail in question or, more likely, would have made some personal investigation of the makers of the forged contracts for which it spent over $30,000.00. The ordinary relationship between a postmaster, performing his duties to the Government, and a mail patron buying and using a three-cent stamp involves no such risk. No statute, bond or regulation says so. If it does involve such a risk, then postmasters are liable on their bonds for misplaced credit, lost contracts, defaulted lawsuits, lost marriages and neglected social obligations.

III. Application of the Law to the Foregoing Factors Negativing Congressional Intent Claimed by Plaintiff.

1. *Washington v. Young*, (1825) 10 Wheat. 455. Since plaintiff's claim rests upon a supposed implied intention of Congress, the proper disposition of that claim will depend in the last analysis upon the particular facts of this case. There is no purpose, then, to be served by burdening this Court with a multitude of citations having reference to different fact situations. However, a few cases have presented fact situations so analagous that particular study of those cases will be helpful.

Probably the most important early case in this Court which raised the question of the rights of a private person under an official's bond running to a governmental body as sole obligee is *Washington v. Young* (1825) 10 Wheat. 455. There the City of Washington, conducting a lottery, employed a manager who gave a bond to the city. The purchasers of a winning ticket brought suit on the bond in the name of the City but for the purchasers' personal benefit and without the consent of the City. It was held that private persons could not sue on the bond without the consent of the City. Marshall, C. J., said for this Court:

> "The first inquiry is into the right of the proprietors of the ticket No. 1037, to sue in the name of the corporation without its consent. Their counsel insists, that the bond was taken for the benefit of the fortunate adventurers in the lottery, and that each has a right to use it. * * *
>
> "* * * They had, undoubtedly, 'a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application,' if the purpose of the bond was to secure the fortunate adventurers in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize ticket had an interest in this bond, the proprietors of every other prize ticket had the same interest; *and it could not be in the power of the first bold adventurer who should seize and sue upon it, to appropriate it to his own use*, and to force the obligees to appear in court as plaintiffs against their own will. *No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent*

> *given in fact, or by legal intendment.* * * * we think, upon general principles, they had no right to institute this suit without the consent of the corporation. (pp. 407-409)

The analogy between the *Young* case and the case at bar is particularly apt. Both actions are brought on governmental officer's bonds, in the name of the governmental obligee, for the benefit of a private person, without the consent of the named obligee. Both actions are brought on bonds which were taken by the government for its own protection and not for the protection of its patrons. On settled general principles, it was held that one who is not the owner of an obligation has no rights under it and that such a person cannot sue on it in the name of the owner without the owner's consent. The same argument was made there, as here, that the bond was taken for the benefit of the government's patrons. But this Court pointed out that even if such had been the case, still "it could not be in the power of the first bold adventurer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will" (p. 409). That is especially significant in this case where plaintiff's claim is based exclusively on the argument that postmasters' bonds are taken partly for the benefit of mail users. No one knows what other mail users may have been damnified.

This Court pointed out in the *Young* case that even if the bond had been taken exclusively for the benefit of the mail users, still no single one of them could race the others to the Court House and appropriate the entire security to himself to the exclusion of the others, and that such

person could not appropriate the name of the government without its consent. So, even if the bond here in suit had been taken *exclusively* for mail users, still this plaintiff could not sue on it in his own name and could not sue in the name of the government without its consent. Where, as here, plaintiff does not claim that the bond was taken exclusively for mail users, but only "secondarily" for them, it is of even greater importance that a private person be not able to appropriate the entire penalty to his own benefit and leave without security not only the other mail users but the Government for whose "primary" benefit the bond was taken. The actual holding in the *Young* case was that the bond was taken for the security of the city and not to secure its lottery patrons. What this court said in the *Howard* case (184 U. S. 676) was that the lottery bond was taken "primarily" for the benefit of the city (p. 691). So here, the acting postmaster's bond was taken for the security of the Government rather than for its postal patrons and plaintiff has no rights under the bond with or without the consent of the Government to the use of its name.

2. *Cases following Washington v. Young.* This Court has never deviated from the twin principles of the *Young* case, that no person other than the owner of a bond can put it in suit unless the legislature has granted such right, and that no person can use the name of another without its express or implied consent.

In *German Alliance Ins. Co. v. Home Water Supply Co.* (1912), 226 U. S. 220, the defendant had made a contract with the City to maintain pipes and waterworks and supply the City with water suitable for fire purposes. It failed

to do so, and the Insurance Company, insuring buildings destroyed by fire by reason of the failure, brought the action against the Water Company.. Demurrers to the complaint were sustained. Considering the contention of the Insurance Company that the contract between the defendants and the City was for plaintiff's benefit this court said:

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his *direct benefit*. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they '*may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.*' Nat. Bk. v. Grand Lodge, 98 U. S. 123, 124. Hendrick v. Lindsay, 93 U. S. 143, 149; National Savings Bk. v. Ward, 100 U. S. 195, 202, 205. * * *

"The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

"He is interested in the faithful performance of contracts of service by policemen, firemen, and *mail contractors*, as well as in holding to their warranties the vendors of fire engines. All of these employes, contractors, or vendors are paid out of taxes. But for the breaches of their contracts *the citizen cannot sue—though he suffer loss because the carrier delayed in hauling the mail*, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven, Negligence in Law

(3d ed.) 305; Pollock on Torts (8th ed.), 434, 547; Davis v. Clinton, 34 Iowa, 59, 61.

"Each of these promisors of the city, like the Water Company here, would be liable for any tort done by him to third persons. But for *acts of omission and breaches of contract*, he would be responsible to the municipality alone. *To hold to the contrary would* unduly extend contract liability, would introduce new parties with new rights, and would *subject those contracting with municipalities* to suits by a multitude of persons for damages which were not, and, in the nature of things, could not have been, in contemplation of the parties. * * *" (pp. 230, 231).

The reasoning of this Court in the *German Alliance* case, supra, and the language it used are directly applicable to the case at bar. This Court first distinguished a case in which the contract of the defendant with a governmental body, or the ordinance granting authority, expressly contemplated the benefit of suits by third persons. That is the distinction between the *Howard* case, supra, and the case at bar.

Further, this Court in the *German Alliance* case pointed out that even under the most liberal doctrine of any state permitting third parties to sue on contracts, an indirect interest, such as the sender of the mail has in the performance of a contract between the United States and a contractor to promptly transmit the mail, is insufficient to give such third party a direct action on the contract. In illustrating the point, by reference to a situation which this Court apparently considered too clear for argument (otherwise it would not have used the illustration), this Court pointed out that *the user of the mails cannot sue the mail contractor*

for delays in delivery, however much the sender may be damaged. That illustration is the case at bar.

This Court then pointed out in the *German Alliance* case, as we have here, that to hold that this suit might be brought would be to introduce new parties to the contract and extend liability thereunder to the limits of speculation and to multitudes of unknown, unidentifiable, and unforseeable persons. And lastly this Court pointed out the contrast between the consideration paid and the suggested liability assumed under the contract. So here, it is plaintiff's claim that, for three cents, it purchased not only the transportation of its letter but security against loss of invaluable contracts which its letter might produce.

The doctrine first announced by *Washington v. Young*, supra, and re-examined and reiterated in the *German Alliance* case, supra, has been consistently followed in later cases.

In *Robins Dry Dock and Repair Co. v. Flint, et al.* (1927), 275 U. S. 303, a steamship had been chartered to the libellant with a provision for docking same each six months and suspension of hire during the docking. The defendant was the docker under contract with the *owner of the vessel.* During the docking operation defendant negligently injured the vessel requiring repairs which extended the period of docking to the damage of libellant. The docker settled with the *owners of the boat,* but the libellant claimed the contract for docking between defendant and *the owners of the vessel* "was made for the benefit of the libellant and was incidental to the aforesaid charter party". (Just as here plaintiff claims that the postmaster's bond between the surety and the United States was for its benefit.) In reversing the Circuit Court

of Appeals, which had allowed recovery on other grounds, this Court, through Mr. Justice Holmes, said:

"Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner third persons, as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondent but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners —and while intentionally to bring about a breach of contract may give rise to a cause of action, Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See Savings Bank v. Ward, 100 U. S. 195. The law does not spread its protection so far. * * *" (p. 308)

"But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. *The respondents have no claim either in contract or in tort, and they cannot get a standing by suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.*" (p. 309).

The italicized portion of the above quotation has direct application to this case.

It will be noted that Mr. Justice Holmes in the *Flint* case, supra, was careful to point out (arguing by analogy) that the mere fact that the United States might in some circumstances recover upon Malone's bond and be *morally bound* to give plaintiff some portion of the recovery, does not give plaintiff *itself* a right of action on the postmaster's bond. This very situation is anticipated and provided for by the Postal Laws and Regulations (Sec. 816), which provide that suits for misdelivery of mail shall be brought in a certain manner by the United States and that the recoveries in such suits shall be distributed by *administrative officers* to the persons found entitled thereto.

The views expressed by this Court in the *Flint* case, supra, and the *German Alliance*, supra, have been cited and followed in various federal and state courts. *Federal Surety Co. v. Minneapolis Steel & Machinery Co.* (C. C. A. 8—1927), 17 F. (2d) 242; *Chicago, etc. Ry. Co. v. Maryland Casualty Co.* (C. C. A. 8—1935), 75 F. (2d) 596, 598; *District of Columbia, to Use of Langellotti v. Fidelity Deposit Co. of Maryland* (Ct. App. D. C.—1921) 271 Fed 383; *Fosmire v. National Surety Co.* (Ct. App. N. Y.—1920), 127 N. E. 472; *Sunter v. Frazer* (Cal. 1924), 228 Pac. 660.

Moreover, the cases following *Washington v. Young* demonstrate that the statutes and bond here involved were not intended by Congress to confer on private persons a right to appropriate the name of the United States for their private lawsuits on the bond. A clear-cut analysis of this point and the cases underlying it was made by Judge Nordbye in his order of dismissal (74-77, 81-87). It is of marked signifi-

cance that another Court confronted with the identical question independently arrived at the same conclusion on the same authorities. *United States v. United States Lines Co.*, (D. C. N. Y.—1938) 24 Fed. Supp. 427. In the last cited case, registered mail was stolen while being transported by the defendant steamship lines under a mail contract with the United States. The mail contract provided that the steamship line would be liable to the United States for any loss or damage to the mails caused by the line's failure to use due care in handling mail. Certain insurers of the stolen mail, having paid the losses sustained, requested and received from the Attorney General express authority to bring suit in the name of the United States against the Lines to recoup their losses. However, before any suit had been commenced under the authorization from the Attorney General, the authorization was rescinded and revoked. Despite the revocation of the Attorney General's authorization, suit was commenced in the name of the United States on behalf of the insurers involved. The defendant moved for a dismissal on the grounds that the suit was brought without the consent of the United States and contrary to its instructions and that the plaintiffs had no authority whatsoever to act in the premises. (Page 427). Considering the questions thus raised by the motion the Court said:

> "It is clear that there is no privity of contract between United States Lines and the users of the mail or their subrogees. * * * The indirect benefit to the senders of the mail, if the United States should choose to sue, does not justify suit under the mail contract, *by the senders in their own right without the consent of the United States.* (Citing *German-Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 33 S. Ct. 32,

57 L. Ed. 195; 42 L. R. A. (N. S.) 1000 and quoting therefrom) * * *

The absence of privity of contract and of any right of the senders of the mail or their subrogees, to sue on a contract to which they were not parties seems to be recognized by the proctors for the libelant, for they have commenced this suit, not in the name of the individuals or corporations who are ultimately to benefit, but rather in the name of the United States of America *which alone stands in privity of contract with United States Lines.* * * *

It thus appears that although the United States Government, *the only party who may sue upon the cause of action pleaded* in the libel, has decided not to sue, an attempt is here made to bring suit *in its name and against its will.* * * * In my opinion, such an attempt cannot succeed, for were the law otherwise a person indirectly to be benefited by the enforcement of another's right, could bring suit in the latter's name, though in his own name he was without right of remedy, and the holding of German-Alliance Ins. Co. v. Home Water Supply Co., supra, could be thus easily avoided. * * *".

Referring to the cases relied upon by the proctors for the libelant in the cited case and by the plaintiff herein as justifying the maintenance of the action (*Howard v. United States*, 184 U. S. 676; *United States ex rel. Brimberg Bros. v. Globe Indemnity Co.*, (C. C. A. 2) 26 Fed. (2d) 191; *United States, ex rel. Matthews v. Massachusetts Bonding & Ins. Co.*, 202 N. Y. Supp. 867; Id., 238 N. Y. 334, 144 N. E. 631), the Court said:

"In each one of these cases suit was commenced in the name of the United States, and in the Howard Case it was stated that the consent of the United States to the use of its name was not necessary. However, each

> of these suits was upon a bond which had been posted to secure faithful performance of his duties by a certain individual occupying a public or quasi public position. The bonds were required by statute and were intended for the benefit of members of the public who would have dealings with the one who was bonded. Those cases, involving suits on bonds, are not persuasive here. Though the bonds ran to the United States of America, yet, by necessary implication, "by legal intendment" (Howard v. United States, 184 U. S. at page 691), suit was proper in the name of the United States, on the relation of the person suffering an injury which it was the purpose of the bond to safeguard. See the discussion in the Howard Case, 184 U. S. at pages 692, 693, relating to the nature of a bond and the express or implied right to sue given to the persons who are protected by the bond". (p. 429).

In closing, the opinion states: "I, therefore, reach the conclusion that the proctors for *libelant had no right to bring this action in the name of the United States without its consent*" (p. 429). A similar conclusion is compelled in the case at bar.

In *Idaho Gold Reduction Co. v. Croghan*, (Idaho—1899), 56 Pac. 164 the Supreme Court of Idaho, in sustaining a demurrer to plaintiff's complaint, stated:

> "We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute". (p. 164.)

The same conclusion was arrived at in *United States v. Griswold* (Ariz.—1904) 76 Pac. 596, a suit on a postmaster's bond, the Court stating it thus:

"At common law suit upon an official bond must be brought and a recovery had in the name of the obligee. There is no congressional statute modifying the common law limiting the liability of sureties to suits brought by or in the name of the United States, as there is in the case of bonds given by United States marshals. In the latter case there is statutory authority authorizing any person to bring, in his own name and for his sole use, suit on the marshal's bond for a breach of its conditions. Section 784, Rev. St. U. S. (U. S. Comp. St. 1901, p. 607 (28 U. S. C. A., Sec. 500). *It follows, therefore, that P. Sandoval & Co. could not maintain a suit on the postmaster's bond in their own name to recover for the loss of the registered package.* * * *".

More recent cases affirming these principles in suits on official bonds are: *Moody, Governor of Texas, ex rel. United States v. Megee,* (C. C. A. 5—1930) 41 Fed. (2d) 515, affirming (S. D. Texas—1929) 31 Fed. (2d) 117, [Pilot's bond naming Moody, Governor of Texas, as obligee; pilot negligently injured vessel owned by United States, which brought suit on his bond using name of obligee; demurrer to complaint sustained; Court holding bond did not run in favor of third persons]; *Bowers, Collector of Internal Revenue v. American Surety Co.,* (C. C. A. 2—1929) Fed. (2d) 244, [Bond given to secure payment of taxes; plaintiff's predecessor in office named as obligee; plaintiff's right to sue on bond in own name questioned; held, (headnote) in absence of some enabling statute, the obligee named in a bond must sue on it]; *Munroe v. Raphael* (1933) 288 U. S. 485, [Receiver, appointed by United States District Court, sold property to purchaser who agreed to pay therefor certain percentage of all allowed claims and gave bond running to

the United States for performance of purchase agreement; plaintiff, on permission of the Court, sued surety on the bond in the State court in the name of the United States on his own relation; District Court revoked its permission to so sue; Circuit Court of Appeals reversed action of District Court in so doing; Supreme Court reversed Circuit Court of Appeals, and re-established action of District Court, saying:

> "In parting with the property the receiver as the court's representative, took a bond, running not to the creditors, but to the United States. *Certainly no creditors could bring a suit in his own name on the bond for his share of the purchase money.*"]

If there be virtue in analogy or precedent, *Munroe v. Raphael*, supra, disposes of plaintiff's case.

In *Howard v. United States*, (1902) 184 U. S. 676, this Court again recognized the same principles, but found that the particular statute and "peculiar situation" of that case removed it from the operation of those principles. This Court again recognized that no person other than the obligee of a bond can have any rights under it unless such right be given by the legislature. The contention was made that since the bond was given to the United States, no suit could be maintained on it for the benefit of an individual. That was answered by the finding "that the Congress never intended that any such condition of things should exist" with reference to the particular type of bond and statute there involved. In the *Howard* case this Court also again recognized the second rule of the *Young* case,—that no person can be authorized to use the name of another, without his assent given in fact or by legal intendment. The court

which had custody of the bond for the Government had expressly authorized the plaintiff to sue on it (page 679). Consequently, it is doubtful whether any question of the Government's consent to the use of its name by the plaintiff was in the case. In any event, this Court followed the rule of the *Young* case that such consent could also be given by legal intendment and, examining the statutes and circumstances involved, concluded that such consent had also been given by the legal intendment of the particular statutes involved.

In reading the various cases cited in the briefs, it should be borne in mind that bonds running to the United States are to be construed by the common law of the District of Columbia, being regarded as made in the City of Washington. *Cox v. United States,* (1832) 6 Peters 172; *Tullock v. Mulvane* (1902) 184 U. S. 497, 514. The *Young Case,* supra, is the common law of the District of Columbia respecting this bond. *District of Columbia, to Use of Langellotti v. Fidelity & Deposit Co.,* (Ct. of App., Dist. of Col., 1921), 271 Fed. 383. Under that law plaintiff is without right to maintain this action.

IV. Factors Claimed by Plaintiff to Establish an Implied Congressional Intention: (1) That the Obligations on a Postmaster's Bond are Owed to Patrons of the Postal Service; and (b) That such Patrons Should Have a Right to Appropriate the Name of the United States to Maintain their Private Lawsuits on such Bonds.

1. *Plaintiff claims that mail users are benefited by Postmaster's proper performance of his contract with the Government, and therefore have a "substantive right."*

To be sure, mail users are benefited if the postmaster performs his contract. But that benefit is not the direct one which the *German Alliance*, supra, pp. 54-57, and *Flint*, supra, pp. 57-59, cases require as the basis of a substantive right.

Plaintiff's argument confuses indirect, incidental benefits with a "substantive right" (Pltf. Br., pp. 18-128, particularly pp. 18-22). Then, plaintiff's argument continues, the remedy for that "substantive right" is in the plaintiff in the absence of a statute restricting the remedy (Pltf. Br., pp. 128-165). Plaintiff's repetitious references to the statutes and regulations concerning the handling of mail (see, for example, Pltf. Br., pp. 3, 7-10, 14-17, 18-22, 33, 34, 35-36) are calculated to create the impression that the purpose of those laws and regulations is to directly and personally benefit and protect each individual postal patron. It might as well be argued that a railroad company's operating rules are promulgated for the direct, personal benefit and protection of each individual passenger and shipper. The improved service and increased safety resulting from observance of those operating regulations doubtless result in

a benefit and protection to passengers and shippers, and postal laws and regulations do the same for postal patrons. But the rules themselves are formulated for the company's or government's (i. e., the proprietor's) purpose of efficiently operating its business. From its repeated—but ill-founded—claim that such internal operating rules are established for plaintiff's personal benefit, plaintiff argues that the postmaster's bond requirements are likewise for plaintiff's personal, individual, direct benefit and somehow create a "substantive right" in the plaintiff. Such bonds will not support a direct action by this plaintiff any more than any other fidelity bond of an employee in a private or public utility business will support a suit by a customer. Plaintiff's argument really demonstrates the Congressional intent that the *direct* benefit from, and the *right to sue* on, postmasters' bonds should accrue to the Government rather than to its postal patrons.

A similar confusion is apparent in plaintiff's argument that "the letter of the bond statute confers benefits upon users of the mails as well as upon the Government" (Pltfs. Br., pp. 28-43). That claim rests solely on the proposition that the condition of the bond is the performance of "all duties," etc. Plaintiff then argues that that expression includes duties imposed "for the benefit of mail users" and assumes that duties imposed by the Postal Laws and Regulations incidentally benefiting mail users are "*for* the benefit of mail users" and are duties owed to such patrons.

The fact of the matter is that every one of plaintiff's cited cases which involved a duty imposed by the Postal Laws or Regulations is either a criminal prosecution or a civil action brought by the Government. Each of them was a suit by the United States. So plaintiff's cases them-

selves demonstrate that the duties imposed upon postmasters by the Postal Laws and Regulations (whether or not they incidentally benefit mail users) are duties *owed to the Government.* They do not establish that those duties are owed to private postal patrons like the plaintiff. *Grady v. United States,* (C. C. A.—8) 98 Fed. 238, (Pltfs. Br., p. 30); *United States v. Atlantic Coast Line R. Co.,* (C. C. A.—4) 215 Fed. 56, 59 (Pltfs. Br., p. 30); *National Surety Co. v. United States,* (C. C. A.—8) 129 Fed. 70, (Pltfs. Br., p. 31); *United States v. Bryan,* 82 Fed. 290 (affirmed 90 Fed. 473 (C. C., N. D. Cal.)), (Pltfs. Br., pp. 31, 43); *United States v. Rogde,* (D. C., S. D.) 214 Fed. 283, (Pltfs. Br., p. 32); *United States v. Sander,* (C. C., N. D. Ohio) 6 McLean 598, Fed. Cas. No. 16,219, (Pltfs. Br., p. 35); *United States v. Claypool,* (D. C., W. D. Mo.) 14 Fed. 127, (Pltfs. Br., p. 35); *Spinney v. United States,* 32 Ct. Cl. 397 (Pltfs. Br., p. 36); *Deal v. United States,* (C. C. A.—9) 11 Fed. (2d) 3, (Pltfs. Br., p. 39); *United States v. Barker,* (C. C. A.—3) 100 Fed. 34, (Pltfs. Br., p. 40); *United States v. Fordyce,* (D. C., W. D. Ky.) 122 Fed. 962, (Pltfs. Br., p. 42).

They are actions *by the Government,* demonstrating that those duties are owed not to patrons like the plaintiff, but to the Government. To maintain this action, it is not enough for plaintiff to show that it would have been incidentally benefited by the postmaster's performance of a duty imposed by the postal laws and regulations. Plaintiff must, but does not, go further and show that such duty was owing to it as well as to the Government. The surety contract being collateral to Malone's employment contract with the Government, and being intended to secure the performance of Malone's duties under the prin-

cipal contract, the obligations of the bond are owing to the party to whom the duties under the employment contract are owing—the Government. It follows, then, that plaintiff's enumeration of indirect benefits to mail users which would result from a postal employee's performance of his duties to the Government is not sufficient to establish that Congress impliedly intended to confer on private persons any original rights under postal bonds.

2. *Howard v. United States,* (1902) 184 U. S. 676:

It is manifest that plaintiff, generally speaking, relies for its entire right to maintain the action on *Howard v. United States,* (1902), 184 U. S. 676. That case follows and applies the principles of *Washington v. Young,* supra, but establishes a limited exception to those principles, dependent upon particular statutes and a "peculiar situation" not here involved.

In the *Howard Case,* supra, this Court, in reaching its decision (page 691) quotes the following extract from *Washington v. Young,* supra; and, to emphasize its point, in quoting it italicizes a portion of the quotation:

> "and no person can be authorized to use the name of another without his assent given in fact, *or by legal intendment.*"

There, as must be done in this case, this Court sought the legislative intention as to whether a private party should be able to sue on the bond. The particular condition of the clerk's bond there involved was "faithfully to discharge the duties of his office." The remaining conditions of that

bond were "seasonably to record the decrees, judgments and determinations of the court * * *". The latter condition obviously looks to private litigants and thus makes reasonable the argument that Congress intended that enforcement of all the conditions should be available to them. But consider the case at bar. The particular condition of the bond here involved is "faithfully discharge all duties and trusts imposed upon him as acting postmaster * * *". The remaining conditions are to "perform all duties as fiscal agent of the Government, * * * and * * * in connection with the Postal Savings System" (19). The latter conditions plainly look to the protection of the Government's money and property and indicates an intention that the enforcement of all the conditions should be by the employer of the bonded employee rather than by the employer's patrons.

Again in the *Howard* case this Court carefully points out that the United States, to whom the bond ran, had little interest, if any, to be protected by the bond thereon (bottom of page 687). Upon that premise, and that premise only, this Court (page 691) distinguishes *Washington v. Young*, supra, by pointing out that in that case "the bond was taken, primarily at least, for its (corporation of Washington) protection, and not for the benefit of ticket holders." In this case, the interest of the Government in its own money and property avoids that distinction from the *Young* case. The patent interest of the Government in protecting its own money and property in the hands of its postmasters clearly indicates that the bond here in suit was taken for its protection and not for the direct benefit of its postal patrons.

At the beginning of the opinion (pages 682-686) this Court in the *Howard* case reviews for several pages federal statutes applicable to federal clerks of court, and in the middle of page 692 of the opinion, after reviewing these statutes, places its decision squarely on the *intendment* of Congress that it found expressed in those statutes. The court buttressed this construction by pointing out (page 682) that the *money* in question had been paid the clerk in the *Howard* case pursuant to an order of the court, and the payor had no possibility of protecting himself from loss other than by an action on the bond. But the statutes and regulations applicable to the bond here in suit, by comparison, exclusively refer to Governmental action in connection with such bonds and disclose an intendment that the Government should enforce them. Here, plaintiff's mail was not deposited pursuant to any court or Governmental order and plaintiff ignored the insurance and registry provisions that had been made for his protection.

Plaintiff itself suggests that the postal service is a proprietary rather than a governmental function, and that "'the post office is in reality a public utility.'" (Pltfs. Br., p. 108). Therefore, in requiring postmaster's bonds, Congress was managing a business and presumably intended to take such bonds for the protection of the business and reserve to the business the rights of action thereon—the same way that prudent managers of similar businesses do. That is the *normal* situation and distinguishes this case from the "*peculiar* situation" which confronted this Court in the *Howard* Case. It discloses a different "legal intendment" as to whom postmaster's bonds should protect and who should have the right of action on them.

The conclusion of the opinion in the *Howard* Case (page 694) distinguishes that case from all other cases raised under other statutes relating to bonds on other officers, by pointing out and emphasizing the *"peculiar situation"* of the clerk of court toward private litigants in his court and by reason thereof their beneficial interest in his bond. This shows that the purpose of this Court was that the *Howard* case be regarded *sui generis,* and only a precedent as respects bonds of clerks of federal district courts under the then statute.

This conclusion that the *Howard* case is not a precedent in this case, or in every case involving an official bond, is fortified by a reading of the opinions in the *Howard* case in the lower courts. In the opinion of the Circuit Court of Appeals reported in 102 Fed. 77, the particular federal statutes applicable to clerks of court are reviewed. On page 81 of that opinion that court points out that little or no money of the United States, the obligee named in the clerks' bonds, comes into the hands of the clerk in the ordinary course of his duties, but the money of private suitors would be frequently in his hands. From this the Court drew the conclusion that the intendment of the statutes reviewed by it was that private suitors might sue upon the bond having placed their money with the clerk as "a private trust".

The distinction between the *Howard* case and this case is obvious. The obvious and preponderant interest of the Government in protecting its own property in the hands of the postmaster, reject any interpretation spelling out any intendment of the statutes or the regulations that the Postmaster's bond is for the benefit of private mail users. Particularly is this true in the light of the remedies and

procedure set up by Sec. 816 of the Postal Laws and Regulations.

The distinction above made between the *Howard* case and this case is further buttressed by the opinion of the trial court in the *Howard* case (93 Fed. 719), where the judge who ordered the money in question delivered to the clerk pointed out (pages 720-721) that the clerk in question received little or no money of the United States, since suits in which the United States was interested were within the jurisdiction of another court, i. e., the district court at that time.

Aside from these legal distinctions, there is a practical distinction between the *Howard* case and this case. In the *Howard* case the clerk who received the money from Henry County paid in satisfaction of Stewart's claim (184 U. S. 682) could not help but know what he received and what the results from his mishandling or loss of the money would be. Yet with this knowledge he deposited the money to his *individual credit* rather than that of his office. Compare that situation with that of a postmaster who, without any knowledge of the contents or purpose of letters received in his postoffice, whether addressed to a person known or unknown to him, either misdelivers or fails to deliver that letter, being "convinced" that his procedure is perfectly "proper" (72). Under no stretch of the imagination can it be claimed that he is in the same position as a man who receives delivery of property the nature and character of which is apparent at delivery and in no way concealed or withheld from his scrutiny, and appropriates such property to his personal use. There is no element of thievery in the postmaster's conduct, and there is no index of value in the property involved. To hold a postmaster to

the same measure of liability as the clerk in the *Howard* case is to extend the "peculiar situation" spelled out by this court in the *Howard* case far beyond the limits indicated by the views expressed in the various decisions.

The *Howard* case aside, plaintiff is without authority for any of the contentions urged by it in support of its right to sue on the bond, either in the name of the United States or otherwise. The fact that this court in the *Howard* case by an analysis of the federal statutes pertaining to clerks of United States circuit courts and having in mind that the United States was hardly ever a litigant in those courts, found the intendment required by the rule of *Washington v. Young*, supra, and applied that intendment to the bond before it so as to permit recovery by Stewart, is not a departure from the rule of *Washington v. Young*, supra, but is at best a very limited instance of statutory authority for a third person to sue on the particular bond there involved *with the consent of the United States.*

3. *Remaining cases cited and quoted by plaintiff.*

It will serve no useful purpose to refer to each of the 166 cases cited in plaintiff's brief. Plaintiff cited only 42 cases to the Circuit Court of Appeals, and examination has disclosed that plaintiff has now cited 124 additional cases. They add nothing. However, plaintiff seems especially to rely on the cases wherein the United States was permitted to recover on a postmaster's bond for losses to postal patrons even though the Government sustained no loss of its own (Pltfs. Br., pp. 119-127). Two distinctions between those cases and the case at bar are immediately apparent: (a) Each of those cases was a suit by the United States,

the named statutory obligee, and not like this one a suit by a stranger to the bond. To that extent they support defendant's position rather than plaintiffs. (b) No one of those cases was a suit for consequential damages, but each was a suit for the value of goods lost in the mail. This second distinction lies in the considerations upon which those cases rest. The recovery by the Government in those cases was supported on the ground of the Government's "moral obligation" to recover from a wrongdoer and turn over the amount of the recovery to its customers. For example see *United States v. American Surety Co.* (C. C., Md.) 161 Fed. 149 (cited and quoted on page 124 of Pltfs.' Br.). The description of the Government's obligation to its customer as a "moral obligation" is one way of saying that there is no *legal duty.* None of the cases pointed out any moral or legal obligation *to the patron* imposed upon the surety by its bond. Nevertheless, plaintiff argues that because the Government can recover as bailee, and since—under the law of bailments—a right of recovery by the bailee does not preclude a right of recovery by the bailor (8 *C. J. S.* 371), the mail user-bailor should be permitted a recovery in this action. Plaintiff fails to point out that, in the law of bailments, a bailee may recover from a wrongdoer the full value of the bailed goods even though the bailee is under no liability to the bailor unless and until the bailee so recovers. 6 *Am. Jr.*, pp. 386-387 (Bailments, Sec. 302). Plaintiff also fails to point out that a bailee is under no *obligation* to sue for its bailor. See, 6 *Am. Jr.* 377 (Bailments, Sec. 292). Therefore, if the Government's right to recover for the benefit of its postal patrons is based upon a "duty" of any kind—moral or legal—then such right is not based upon the law of bailments because

no such duty is imposed on a bailee. A bailee owes no duty to the bailor to sue the third person, and a bailee may sue the third person even though not itself liable to the bailor for the loss of the goods. See, *Am. Jr.*, supra.

If the law of bailments has any application to this action at all, it is only to demonstrate that the action cannot be maintained for the consequential damage plaintiff has alleged. A bailee cannot recover consequential damages for the loss of the goods. A bailee's right to recover the full value *of the bailed goods* is based upon his right of possession. A wrongdoer who does not claim under the bailor cannot assert the bailor's title. So, the bailee's right of possession is good title as against the wrongdoer who has no better title and cannot assert the rights of the only person who does have a better title. *The Winkfield* (1902) Probate (Eng.) 42, 3 B. R. C. 368-C. A.; 6 *Am. Jur.*, pp. 387-388. (Bailments, Sec. 303). So, the bailee is allowed to recover the full value of the property taken from him on the ground that as against the wrongdoer the bailee is the owner. But the ground of such recovery (the bailee's possession and title as against the wrongdoer) precludes the bailee from recovering the value of something he never had and never could have—that is to say, the consequential damage. But that is what this plaintiff says the Government as bailee could recover for it as bailor. And that is what has never happened in any of the cases plaintiff cites to support that claim. Plaintiff seeks to recover the losses from transactions which it says it would not have undertaken had there been proper delivery of "bailed" letters The bailee (post office), once having delivered plaintiff's letter, would lose its possession and qualified title to the letter, and never would have possession or title under any

circumstances to that value which would or could result only to the plaintiff from its delivery of the letter.

Another description of the moral obligation on which the Government so recovers is its position as *parens patriae*. *United States v. United States Fidelity & Guaranty Co.* (C. C. A. 6, 1918) 247 Fed. 16, 18 (quoted Pet. Br., pp. 125-126). In any event, none of the cases cited by plaintiff supports its claim that a private mail user may directly recover on the Government's bond for consequential damages to the patron. The fact that the Government makes the recovery establishes that it, and not the mail users, is the sole obligee of the bond and the sole party possessing any right to sue thereon.

These distinctions (a) that the Government is plaintiff; and (b) that the suits are for only the intrinsic value of the goods lost and not for the consequential damages, are buttressed by the statement of Mr. Justice Holmes in *Robins Dry Dock and Repair Co. v. Flint, et al.*, (1927) 275 U. S. 303:

> "But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. *The respondents have no claim either in contract or in tort, and they cannot get a standing by suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.*" (p. 309).

The italicized portion of the above quotation has direct application to this case.

CONCLUSION.

If this plaintiff can sue this bond without the consent of the United States, others like it can do so. If they can sue it without consent of the United States, they can sue without knowledge of the United States. The Government will then not know which postmasters are bonded for the care of Government money and property and which bonds have been exhausted by mail-users. Then the elaborate provisions of statutes and regulations defining the liability of the bond respecting Government money and property are stripped of significance save as models of literary form. That was not their intent or purpose.

The Acts of Congress require that the obligee of this bond be the United States and that suit be in its name. That evinces intent that the United States be plaintiff. That purpose is not served by ignoring those statutes as this action does. The Regulations, with concomitant statutes filling the interstices, form a consistent whole for the protection of Government in respect of each class of property that may come to, and each act that may be done by, a postmaster. The fact that occasional statutes fill the interstices of the Regulations, coupled with the long history of the Regulations, show a Congressional cognizance and approval of the scheme as a whole. The extent of responsibility of the bond is defined for the various types of property and acts, and when the bond is to be held for consequential damages beyond the intrinsic value of property express provision is made (Postal Laws & Regulations, Sec. 1426). Not only is a consistent scheme thus provided for the protection of Government, but a similar one has been

worked out to afford administrative remedy through the Government in proper cases to the users of the mail. Losses to patrons through negligence of the postmaster or through any other imaginable act are explicitly provided for, and suit is afforded on the bond by the proper officers of the United States in accordance with the purposes of the statutes and the interrelationships of the scheme. Distribution to mail users of the proceeds of such suit on the bond by the United States is provided for. In this way suits are brought by the United States the obligee, the patrons' interests are cared for, the bond is not exhausted to the prejudice of the United States and of other patrons by the first bold adventurer that may seize upon it, and bondsmen are held to a single standard of liability.

All this must be ignored if plaintiff is to maintain this suit. Not only that, but plaintiff must also establish that the Congress and the Department which gave it so many safeguards were inadvertent in failing expressly to give it an action. If that be assumed, plaintiff must further establish that the statute which requires suit in the name of the United States is complied with by the United States' refusal to sue, and establish that a legislative intendment permitting others than the obligee to sue on such bonds is the necessary implication of the absence of legislation. If all these be assumed, plaintiff must further establish that the bond is liable for what the obligee United States has never in any case claimed,—not for what the postmaster lost but for what some one else did before the postmaster made an innocent mistake. The money lender, who did not investigate the loan but who believed the forger and paid him over $30,000, claims that the postmaster's similar belief in the forger and resultant misdelivery of form letters

subjects him and his sureties to the same civil liabilities as the forger.

To do all this plaintiff relies upon a case arising under different statutes and peculiar circumstances where a court officer stole tangible money left with him by order of court. It is a case which this Court characterized as a "peculiar situation" in the light of the relationships involved. That case aside, plaintiff would have nothing to argue about here, and a great welter of words would be avoided. A "peculiar situation" does not furnish a precedent. The other cases decided by this Court and above referred to do not arise out of a "peculiar situation" and furnish precedents which compel affirmance of the judgments below.

Respectfully submitted,

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